

PUBLIC VERSION

**Before the
Federal Communications Commission
Washington, DC 20554**

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-293
Bureau ID No. EB-20-MD-004

Reply Affidavits

- A. Reply Affidavit of Daniel P. Rhinehart (December 17, 2020).
- B. Reply Affidavit of Dianne W. Miller (December 17, 2020).
- C. Reply Affidavit of Mark Peters (December 18, 2020).
- D. Reply Affidavit of Nea K. Dalton (December 18, 2020).
- E. Reply Affidavit of Bryant E. Oakley (December 18, 2020).
- F. Reply Affidavit of Christian M. Dippon, Ph.D. (December 16, 2020).

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Reply Exhibit A

ATT00345

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DUKE ENERGY PROGRESS, LLC,

Defendant.

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**REPLY AFFIDAVIT OF DANIEL P. RHINEHART
IN SUPPORT OF POLE ATTACHMENT COMPLAINT**

STATE OF TEXAS)
) ss.
COUNTY OF WILLIAMSON)

I, Daniel P. Rhinehart, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T"). As Director – Regulatory, I support AT&T and AT&T-affiliated entities with respect to the development of pole attachment rates pursuant to Federal Communications Commission ("FCC") and state formulas. I executed a prior Affidavit dated August 31, 2020 in support of AT&T's Pole Attachment Complaint against Duke Energy Progress, LLC ("Duke Progress").¹ I am executing this Reply Affidavit to correct and respond to certain statements made by Duke Progress's witnesses in declarations submitted with its November 13, 2020

¹ Compl. Ex. A at ATT0001-23 (Aff. of D. Rhinehart, Aug. 31, 2020).

Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. Duke Progress's Answer Confirms the Validity of My Rate and Overpayment Calculations.

2. Duke Progress did not include any overpayment calculations in its Answer and advocates for grossly inflated new telecom rates calculated by its attorneys.² Its affiliate's Rates and Regulatory Strategy Manager, Dana M. Harrington,³ however, calculated new telecom rates that are very similar to the rates I included in my Affidavit. In particular, Ms. Harrington calculated a 2017 rate that is [REDACTED] per pole higher than the new telecom rate I calculated, a 2018 rate that is [REDACTED] per pole lower than the new telecom rate I calculated, and a 2019 rate that is [REDACTED] per pole higher than the new telecom rates I calculated.⁴ Having reviewed the rate analysis in Duke Progress's Answer⁵ and Ms. Harrington's Declaration,⁶ I confirm that my prior calculations were correct, and that Duke Progress's Answer proposes grossly inflated new and pre-existing telecom rates⁷ that do not comply with FCC methodology.

3. In addition, because Duke Progress invoiced AT&T for the 2020 rental year on December 7, 2020, I calculated the per-pole rental rates that result from the new telecom and pre-existing telecom rate formulas for AT&T's use of Duke Progress's poles during the 2020 rental

² See Answer ¶ 12 (calculating "new telecom rates" by multiplying its declarant's rates by [REDACTED]).

³ Answer Ex. D at DEP000302-322 (Harrington Decl.).

⁴ Answer ¶ 12; *see also* Answer Ex. D at DEP000305-308, DEP000317-322 (Harrington Decl. ¶¶ 11-15 & Exs. D-4 – D-6).

⁵ Answer ¶¶ 12, 22, 31, 37, 38.

⁶ Answer Ex. D at DEP 000302-22 (Harrington Decl.).

⁷ Answer ¶¶ 12, 22, 31, 37, 38.

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year. I completed these calculations in the same manner described in my opening Affidavit.⁸ A complete set of my rate calculations for the 2017 through 2020 rental years is attached as Exhibit R-5 (rate development) and Exhibit R-6 (weighted average cost of capital).⁹ They show that the properly calculated new telecom rate for AT&T's use of Duke Progress's poles during the 2020 rental year is \$7.33 per pole and the properly calculated pre-existing telecom rate for AT&T's use of Duke Progress's poles during the 2020 rental year is \$11.10 per pole.

1. Duke Progress Incorrectly Calculates the New and Pre-Existing Telecom Rates for AT&T's Use of Duke Progress's Poles.

4. Duke Progress miscalculates new telecom rates for AT&T that are up to [REDACTED] times the new telecom rates permitted by Commission rules and up to [REDACTED] per pole higher than the new telecom rates Duke Progress calculated for AT&T's competitors:

| Comparison of Per-Pole New Telecom Rate Calculations | | | | |
|--|------------|------------|------------|--|
| Rental Year | 2017 | 2018 | 2019 | |
| Properly calculated new telecom rate ¹⁰ | \$7.16 | \$7.30 | \$7.84 | |
| New telecom rate Duke Progress calculated for AT&T's competitors ¹¹ | [REDACTED] | [REDACTED] | [REDACTED] | |
| Duke Progress's proposed new telecom rate to charge AT&T ¹² | [REDACTED] | [REDACTED] | [REDACTED] | |

⁸ Compl. Ex. A at ATT00003-07, ATT00009-10 (Rhinehart Aff. ¶¶ 4-11, 16-17).

⁹ My calculations for the 2017 through 2019 rental years are the same as those attached to my prior Affidavit. My calculation of Duke Progress's rate of return for the 2020 rental year is based on information provided in orders of the North Carolina Utilities Commission and South Carolina Public Service Commission, relevant excerpts of which are attached to AT&T's Complaint. *See* Compl. Ex. 21 at ATT00252-269 (Excerpt, 2018 NCUC Order); Compl. Ex. 24 at ATT00316-344 (Excerpt, 2019 SC PSC Order).

¹⁰ Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1).

¹¹ Answer ¶ 12; *see also* Answer Ex. D at DEP000305 (Harrington Decl. ¶ 10); Duke Progress's Resp. to AT&T's Interrogs., Ex. 3 at DEP000111 to DEP000114.

¹² Answer ¶¶ 12, 31, 37.

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5. Duke Progress also miscalculates pre-existing telecom rates for AT&T that are far higher than permitted by Commission rules. Because the pre-existing telecom rate is by rule about 1.51 times a new telecom rate,¹³ I converted the rates Duke Progress calculated for AT&T's competitors into pre-existing telecom rates. My analysis shows that Duke Progress's calculation of pre-existing telecom rates for AT&T are up to [REDACTED] times the pre-existing telecom rates permitted by Commission rules and up to [REDACTED] per pole higher than the pre-existing telecom rates converted from the rates Duke Progress calculated for AT&T's competitors:

| Comparison of Per-Pole Pre-Existing Telecom Rate Calculations | | | | |
|--|------------|------------|------------|--|
| Rental Year | 2017 | 2018 | 2019 | |
| Properly calculated pre-existing telecom rate ¹⁴ | \$10.84 | \$11.07 | \$11.88 | |
| Pre-existing telecom rate converted from rates Duke Progress calculated for AT&T's competitors ¹⁵ | [REDACTED] | [REDACTED] | [REDACTED] | |
| Duke Progress's proposed pre-existing telecom rate to charge AT&T ¹⁶ | [REDACTED] | [REDACTED] | [REDACTED] | |

¹³ A properly calculated new telecom rate for use of Duke Progress's poles using the FCC's presumptive inputs is 0.66 times the pre-existing telecom rate. *See* 47 C.F.R. § 1.1406(d); Compl. Ex. A at ATT00006 (Rhinehart Aff. ¶ 10). This means that the pre-existing telecom rate is about 1.51 times the properly calculated new telecom rate ($1 / 0.66 = 1.51$). The 1.51 ratio is an approximation of the actual calculation result, which yields 1.515151... In practice, the pre-existing telecom rate can simply be derived by dividing the new telecom rate by 0.66.

¹⁴ Compl. Ex. A at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17 & Ex. R-1).

¹⁵ This row converts the "CLEC" rates on page 13 of Duke Progress's Answer into pre-existing telecom rates by dividing the "CLEC" rates by 0.66.

¹⁶ Answer ¶¶ 22, 38; Answer Ex. D at DEP000309 (Harrington Decl. ¶ 16). Duke Progress computes these inflated pre-existing telecom rates by departing from the Commission's standard presumptions without providing survey data that is sufficient to rebut the presumptions—an error I detail below. Notably, Duke Progress does *not* depart from the presumptive inputs when computing the rates applicable to AT&T's competitors. *See* Answer Ex. D at DEP000305 (Harrington Decl. ¶ 10 n.1); *see also* Duke Progress's Resp. to AT&T's Interrogs., Ex 3 at DEP000111-114 [REDACTED]

[REDACTED] Compare *with* Reply Ex. A at ATT00368 (Rhinehart Reply Aff., Ex. R-5 at lines 7 to 13).

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6. Duke Progress's rate calculations violate Commission rules and the Commission's principle of competitive neutrality, as they would charge AT&T far more than its competitors. The errors result in grossly and artificially inflated rental rates, which would overcompensate Duke Progress by capturing far more than the 7.4% of pole costs covered by a properly calculated and fully compensatory new telecom rate and the 11.2% of pole costs covered by a properly calculated pre-existing telecom rate in Duke Progress's urban service area.¹⁷

7. Ms. Harrington identifies five differences between the rates that Duke Progress calculated and the rates that I calculated for AT&T's use of Duke Progress's poles. The identified differences do not call my calculations into doubt and, in each instance, the impact on the resulting rate is minimal.

8. *First*, Ms. Harrington criticizes my use of DEP's [REDACTED]

[REDACTED]
[REDACTED]¹⁸ The difference between the values we each use is most apparent in line B1 of our respective calculations, described in my calculations as [REDACTED] and in her calculations as [REDACTED]¹⁹ I believe my approach is consistent with ratemaking in North and South Carolina, and should be used here.²⁰

¹⁷ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299, 5305 (¶¶ 137, 150 n.453) (2011) ("*Pole Attachment Order*").

¹⁸ See Answer Ex. D at DEP000306-307 (Harrington Decl. ¶ 12).

¹⁹ Compare Compl. Ex. A at ATT00014 (Rhinehart Aff., Ex. R-1) with Answer Ex. D at DEP000316 (Harrington Decl., Ex. D-3).

²⁰ Based on my team's research, Duke Progress has been allowed to [REDACTED] in its rate base in North and South Carolina.

But regardless of whether [REDACTED] or [REDACTED] is used as the base to allocate costs in the rate formula, the difference in ultimate rates is minimal. Utilizing Ms. Harrington's analysis of the impacts, it is clear that the difference in our approaches changes the identified total annual rate per pole by [REDACTED].²¹

[REDACTED]

9. *Second*, Ms. Harrington argues that I did not properly allocate accumulated deferred income tax ("ADIT") because I did not take into account the fact that nuclear fuel gave rise to some of the ADIT on Duke Progress's books.²² I disagree with the mechanics of Ms. Harrington's adjustment because it understates the reduction of rates that should occur if it were to be allowed. I also disagree with the adjustment because it needlessly complicates the rate computations and depends on non-public data.²³

10. *Third*, Ms. Harrington implemented a depreciation rate change mid-year, as compared to my approach of using year-end data.²⁴ This difference only affected the 2018 rate²⁵

²¹ Answer Ex. D at DEP000317-322 (Harrington Decl., Exs. D-4 – D-6, column titled Item (1)).

²² Answer Ex. D at DEP000307-308 (Harrington Decl. ¶ 13).

²³ See, e.g., 47 C.F.R. § 1.1404(e) ("Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source).").

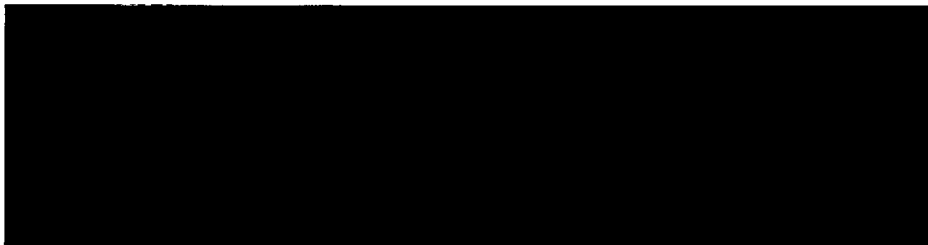
²⁴ Answer Ex. D at DEP000308 (Harrington Decl. ¶ 14).

²⁵ See *id.* at DEP000317-322 (Harrington Decl., Exs. D-4 – D-6, column titled Item (3)).

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and is the reason why Duke Progress calculates a lower new telecom rate for 2018 than I computed.²⁶

11. *Fourth and fifth*, Ms. Harrington criticizes my rate of return calculation, stating that Duke Progress prorates mid-year changes to its rate of return and calculates a blended rate of return for North Carolina and South Carolina based on the relative value of Duke Progress's prior year pole investment in North Carolina and South Carolina.²⁷ My calculation instead applied a new rate of return in the year it took effect, which is consistent with FCC methodology,²⁸ and used a blended rate of return for North Carolina and South Carolina based on the number of Duke Progress poles to which AT&T is attached in each State. My approach was appropriate because it is based on publicly available data,²⁹ while Duke Progress's relative investment in North Carolina and South Carolina is not readily available publicly. In the end, the difference between our approaches is also quite minimal:³⁰



²⁶ See Answer ¶ 12 (stating the 2018 new telecom rate is \$6.81); Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 11) (showing a properly calculated 2018 new telecom rate of \$7.30 per pole).

²⁷ Answer Ex. D at DEP000308 (Harrington Decl. ¶¶ 14-15).

²⁸ See Memorandum Opinion and Order at 18 (¶ 37 & n.137), *Verizon Md. v. The Potomac Edison Company*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (2020) (calculating 2019 rates based on 2019 rate of return).

²⁹ See, e.g., 47 C.F.R. § 1.1404(e) ("Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source).").

³⁰ See Compl. Ex. A at ATT00016 (Rhinehart Decl., Ex. R-2); Answer D at DEP000315 (Harrington Decl., Ex. D-3, line 37).

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12. While Ms. Harrington focuses on these five differences that have a negligible impact on the resulting rates we calculate, she ignores a significant difference in our pre-existing telecom rate calculations that has a material impact on the resulting rate. Without explanation, Ms. Harrington departs from the presumptive input for space occupied by a communications attacher (1 foot) and average number of attaching entities (5).³¹ The use of the presumptive value, however, is required for all communications attachers, including AT&T, because Duke Progress has offered no data to support a different value, let alone credible, statistically reliable data that rebuts the presumption. And, as I noted above, Duke Progress does *not* depart from the presumptive inputs when computing the rates applicable to AT&T's competitors.³²

13. With respect to space occupied by AT&T, Ms. Harrington uses a [REDACTED]-foot value as the "space occupied" input when calculating pre-existing telecom rates,³³ apparently relying on Duke Progress's flawed argument that, contrary to established Commission precedent, AT&T should be assigned 3.33 feet of safety space and [REDACTED] feet of space based on where AT&T's facilities are placed on a pole instead of how much space they occupy.³⁴ The Commission already found that the 3.33 feet of safety space is "usable and used by the electric utility."³⁵

³¹ See Answer Ex. D at DEP000308-309 (Harrington Decl. ¶ 16).

³² See *id.* at DEP000305 (Harrington Decl. ¶ 10 n.1); see also Duke Progress's Resp. to AT&T's Interrogs., Ex 3 at DEP000111-114 [REDACTED]

³³ Answer ¶ 22; Answer Ex. D at DEP000308-309 (Harrington Decl. ¶ 16).

³⁴ See Answer ¶ 12.

³⁵ Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") ("the 40-inch safety space ... is usable and used by the electric utility"); see also *BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") ("The communication space should not be attributed to AT&T because ... AT&T's attachments do not actually occupy the communications safety space."); see also Reply Ex. C at ATT00395 (Peters Reply Aff. ¶ 15).

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Duke Progress concedes that it cannot lawfully charge AT&T's competitors for use of that safety space, and for the same reason, it cannot lawfully charge AT&T for the space.³⁶ And the [REDACTED] foot measurement is wholly unreliable and insufficient to rebut the presumption. It is the result of a mathematical calculation that pairs a presumptive value with a measurement Mr. Freeburn, Duke Progress's Joint Use Manager, says he obtained from a contractor who, as part of Duke Progress's "third-party pole attachment process," performed "field surveys" on 1,039 Duke Progress poles to which AT&T is attached.³⁷ This hearsay based on a sample of unidentified poles, reflecting about 0.7 percent of the Duke Progress poles to which AT&T is attached, is neither random nor verifiable.³⁸ The purported [REDACTED] feet also includes more space than AT&T "actually occupied."³⁹ Duke Progress explains that it reflects the difference between a presumptive average minimum ground clearance height of 18 feet⁴⁰ and the unsubstantiated claim that AT&T's facilities were placed at about [REDACTED] above ground on the 1,039 poles.⁴¹ Duke Progress has thus not provided statistically valid data that rebuts the presumption that a communications attacher occupies, on average, 1 foot of space.⁴²

³⁶ See Answer ¶ 12 n.38 (admitting that "the Commission has already determined that CATV and CLEC attachers should not bear this cost").

³⁷ Answer Ex. A at DEP000250 (Freeburn Decl. ¶ 13).

³⁸ See also *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866, 19869 (¶¶ 18, 25) (2002) (requiring that survey data be "statistically valid" and submitted).

³⁹ See *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'").

⁴⁰ See Answer ¶ 12 (citing *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6465 (¶ 16) (2000)).

⁴¹ Answer Ex. A at DEP000250 (Freeburn Decl. ¶ 12).

⁴² 47 C.F.R. § 1.1410.

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14. With respect to the average number of attaching entities input, Ms. Harrington used a [REDACTED] input in place of the FCC's presumption that there are 5 attaching entities on Duke Progress's poles.⁴³ Duke Progress provides no support for its alternate number except to state that it is "based on survey data collected by VentureSum, our contractor, during a 2017 survey of all DEP poles."⁴⁴ It is impossible to verify this claim because Duke Progress did not provide the survey data as required by Commission rules.⁴⁵ The Commission's rules thus require use of the presumptive input.

15. A final rate calculation error is evident in Duke Progress's Answer. In particular, Duke Progress's attorneys (but not Ms. Harrington) incorrectly state that a new telecom rate for use of 1 foot of space can be "multiplied by the ... usable space occupied" to calculate a new telecom rate for an attacher that occupies more than one foot of space.⁴⁶ This is false. The Commission has held that multiple-foot occupancy by an attacher cannot be assessed as a simple multiple of a one-foot new telecom rate.⁴⁷ Rather, the new telecom formula includes a "space occupied" input that can be adjusted if reliable, actual data show that a communications attacher occupies, on average, more than the presumptive one foot of space on a utility's poles.⁴⁸ Adherence to the formula is crucial because proper application of the formula ensures that the

⁴³ Answer Ex. D at DEP000309 (Harrington Decl. ¶ 16); *see* 47 C.F.R. § 1.1409(c); Compl. Ex. A at ATT00004 (Rhinehart Aff ¶ 6).

⁴⁴ Answer Ex. A at DEP000260 (Freeburn Decl. ¶ 34).

⁴⁵ *See Teleport Commc'ns Atlanta*, 17 FCC Rcd at 19866, 19869 (¶¶ 18, 25) (requiring that survey data be "statistically valid" and submitted); *see also* 47 C.F.R. § 1.726(b).

⁴⁶ Answer ¶ 12.

⁴⁷ *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (the Commission's rate formulas "determine the maximum just and reasonable rate *per pole*") (emphasis added).

⁴⁸ *See* 47 C.F.R. § 1.1406(d)(2).

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unusable space on the pole is equally divided among the attaching entities as required.⁴⁹ The multiplication approach advocated by Duke Progress's lawyers would instead allow Duke Progress to significantly over-recover for the unusable space by double-collecting (or more) from certain attachers.

16. For example, my prior Affidavit calculates proportional new telecom rates for Duke Progress's use of AT&T's poles using 10.5 feet as the space occupied input consistent with the Commission's regulations.⁵⁰ For the 2019 rental year, the correct proportional new telecom rate for Duke Progress's use of AT&T North Carolina's poles is \$8.95 per pole.⁵¹ Had I instead calculated a 1-foot rate and multiplied it by 10.5 feet as Duke Progress advocates, Duke Progress's rate for use of AT&T North Carolina's poles would be \$28.77 per pole—almost \$20 higher per pole.⁵²

17. Ms. Harrington, who is a Rates and Regulatory Strategy Manager for Duke Progress's affiliate, apparently recognizes the flaw in the multiplication approach because she does not defend it in her Declaration and uses the "space occupied" input to calculate rates under the pre-existing telecom rate formula.⁵³ This is evident from the fact that she calculates pre-

⁴⁹ See Compl. Ex. A at ATT00004 (Rhinehart Aff. ¶ 7) (showing space factor calculation); *see also* 47 U.S.C. § 224(d)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities").

⁵⁰ Compl. Ex. A at ATT00008, ATT00018-19 (Rhinehart Aff., ¶ 14 & Ex. R-3); *see also* Compl. Ex. C at ATT00040-41 (Peters Aff. ¶ 12 n.6).

⁵¹ Compl. Ex. A at ATT00008, ATT00018 (Rhinehart Aff., ¶ 14 & Ex. R-3).

⁵² Similarly, the correct proportional new telecom rate for Duke Progress's use of AT&T South Carolina's poles for the 2019 rental year is \$5.06 per pole. Had I instead calculated a 1-foot rate and multiplied it by 10.5 feet as Duke Progress advocates, Duke Progress's rate for use of AT&T South Carolina's poles would be \$16.28 per pole—over \$11 higher per pole.

⁵³ See Answer Ex. D at DEP000209 (Harrington Decl. ¶ 16). Mr. Metcalfe acknowledges this as well, as he states that a new telecom rate for one foot of space occupied is 7.39% of the pole

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existing telecom rates that are about [REDACTED] *lower* than the multiplied new telecom rates Duke Progress proposes.⁵⁴ But by regulation, properly calculated pre-existing telecom rates are about 1.5 times properly calculated new telecom rates.⁵⁵

18. Because Ms. Harrington's criticisms are misplaced and Duke Progress's calculations incorrect, I continue to conclude that the properly calculated new telecom rates for AT&T's use of Duke Progress's poles during the 2017 through 2019 rental years are \$7.16, \$7.30, and \$7.84 per pole, respectively.⁵⁶ And, as noted above, the properly calculated new telecom rates for AT&T's use of Duke Progress's poles during the 2020 rental year is \$7.33 per pole.⁵⁷

2. Duke Progress Did Not Dispute My Overpayment Calculations.

19. In my prior Affidavit, I calculated AT&T's overpayments as compared to just and reasonable rates by comparing the net rental amount that AT&T has paid Duke Progress to the net rental amount that AT&T would have paid if both companies paid proportional new telecom rates. My overpayment calculation showed that AT&T overpaid Duke Progress by [REDACTED] in net pole rent for the 2017 through 2019 rental years using proportional new telecom rates.⁵⁸ Duke Progress has not criticized any aspect of my calculation (aside from the new telecom rates

cost, and that a new telecom rate for two feet of space occupied is 9.15% of the pole cost—and not double the 7.39% one-foot rate. *See* Answer Ex. E at DEP000341 (Metcalf Decl. ¶ 35).

⁵⁴ Compare Answer Ex. D at DEP000309 (Harrington Decl. ¶ 16) (alleging pre-existing telecom rates ranging from [REDACTED] to [REDACTED] per pole) *with* Answer ¶ 12 (alleging new telecom rates ranging from [REDACTED] to [REDACTED] per pole).

⁵⁵ *See* 47 C.F.R. § 1.1406(d).

⁵⁶ Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1).

⁵⁷ *See* Ex. R-5.

⁵⁸ Compl. Ex. A at ATT00007-09, ATT00023 (Rhinehart Aff. ¶¶ 13-15 & Ex. R-4).

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that I calculated for AT&T's use of Duke Progress's poles), and it remains the correct valuation of AT&T's overpayment for the 2017 through 2019 rental years.

20. I also calculated AT&T's overpayments as compared to the net rental amount that AT&T would have paid if both companies paid proportional rates calculated using the FCC's pre-existing telecom rate formula, meaning the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*.⁵⁹ I completed that calculation because the FCC set pre-existing telecom rates as a "hard cap" under the 2018 *Third Report and Order*, and as a "reference point" under the 2011 *Pole Attachment Order*, on the rental rate that may be charged an ILEC that has net benefits under a joint use agreement that materially advantage the ILEC over its competitors.⁶⁰ Duke Progress has not criticized any aspect of my [REDACTED] overpayment calculation (aside from the pre-existing telecom rates that I calculated for AT&T's use of Duke Progress's poles), and it remains the correct valuation of AT&T's overpayment at proportional pre-existing telecom rates for the 2017 through 2019 rental years.

21. It is worth noting that Duke Progress did not challenge the pre-existing telecom rates I calculated for Duke Progress's use of AT&T's poles to calculate this overpayment.⁶¹ The fact that Duke Progress did not challenge my proper application of the Commission's rate formula when calculating rates to be charged Duke Progress for the 2017 through 2019 rental years, coupled with the far lower FCC rates that Ms. Harrington calculated for AT&T's competitors,⁶² strongly suggests that Duke Progress's changes to the rate formulas when

⁵⁹ *Id.* at ATT00010-11, ATT00023 (Rhinehart Aff. ¶¶ 19-20 & Ex. R-4).

⁶⁰ *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and Order*"); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

⁶¹ Answer ¶ 38.

⁶² *Id.* ¶ 12; Answer Ex. D at DEP000305 (Harrington Decl. ¶ 10).

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calculating rates for AT&T are opportunistic and designed to artificially increase rental rates in an effort to try to justify Duke Progress's overcharges under the parties' Joint Use Agreement ("JUA").

B. Duke Progress Has Misrepresented AT&T's Good Faith Negotiations.

22. As I stated in my prior Affidavit, I have personal knowledge of AT&T's good faith negotiations with Duke Progress for a just and reasonable pole attachment rate. I attended two face-to-face meetings with executives from Duke Progress, the first on July 26, 2019 and the second on October 24, 2019. I disagree totally and completely with the allegation of Duke Progress's attorneys that I, or any other member of the AT&T team, approached and conducted the negotiations in bad faith.⁶³ This self-serving assertion is simply untrue. AT&T participated in the entire process in good faith and with a sincere desire to avoid the need for this complaint proceeding.

23. Throughout the negotiations, AT&T and Duke Progress had diametrically opposed views about AT&T's right to a just and reasonable rate for use of Duke Progress's poles under the JUA, grounded largely in Duke Progress's refusal to acknowledge the applicability of prior Commission orders. That disagreement was present from the beginning of the negotiations. At the first executive-level meeting, Dianne Miller, Director – Construction & Engineering, with responsibility for the National Joint Utility Team, Mark Peters, Area Manager – Regulatory Relations, and I explained that AT&T's request was for just and reasonable rates based on the terms and conditions of the parties' JUA. Duke Progress saw things differently. Their representatives expressed the view that the JUA would first need to be converted to a license agreement in order to obtain any rate reductions and questioned why AT&T insisted on owning

⁶³ Answer ¶¶ 7, 9.

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poles at all. At the second executive-level meeting, Duke Progress again expressed the view that the JUA would require amendment for AT&T to obtain lower rates. But even if amended, Duke Progress was still not willing to discuss a new telecom rate for AT&T's existing attachments to Duke Progress's poles.⁶⁴ As Mr. Hatcher confirms, certain topics were "nonstarters" for Duke Progress, including the new telecom rate formula for AT&T's existing attachments, assigning Duke Progress the cost of the safety space that the FCC has found "usable and used" by the electric utility, and refunds of AT&T's prior overpayments.⁶⁵

24. Duke Progress's sole settlement offer confirms that these issues remain "nonstarters" for Duke Progress. Mr. Hatcher claims that the offer would have resulted in

[REDACTED]⁶⁶ This is not true, as Duke Progress [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁷ But even if the offer would have produced

[REDACTED] that does not speak to the only question that matters, which is whether

Duke Progress was willing to negotiate a new rate *based on* the Commission's regulations and

⁶⁴ See Answer Ex. B at DEP000289 (Hatcher Decl. ¶ 17) (stating Duke Progress would discuss the new telecom rate *only* for "poles that are not already in joint use").

⁶⁵ See *id.* at DEP000157-158 (Hatcher Decl. ¶¶ 18-19).

⁶⁶ *Id.* at DEP000291 (Hatcher Decl. ¶ 20).

⁶⁷ See Ex. R-7. [REDACTED]

Orders.⁶⁸ It was not. Duke Progress [REDACTED]

[REDACTED]

[REDACTED]⁶⁹

25. As a result, the parties' disagreements on the merits, rather than bad faith on either side, caused negotiations to fail. I considered each of our meetings to be cordial, comprehensive, and business-like. Each party explained its position at length. And, although representatives for both parties were firm in their arguments, no one was discourteous or unprofessional. We simply did not see eye to eye.

26. One aspect of our negotiations that I found particularly frustrating was Duke Progress's refusal to provide any data or information to substantiate its claim that AT&T should continue to pay rates far higher than the new telecom rate. It was not unreasonable to ask for this information. By rule, Duke Progress is required to supply "all information necessary" to understand the rates it charges CLECs and cable companies within 30 days of a request.⁷⁰ And the Commission's 2011 *Pole Attachment Order*'s guidance and 2018 *Third Report and Order*'s presumption are both intended to encourage settlement through *informed* negotiations. In Duke Progress's view, it can rely on unsubstantiated allegations during negotiations because it does not think it is "an efficient use of resources outside of a litigated dispute" to conduct the analysis

⁶⁸ See *FPL 2020 Order*, 25 FCC Rcd at 5327 (¶ 12) ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.").

⁶⁹ See, e.g., Answer Ex. 4 at DEP000173 [REDACTED]

[REDACTED] "the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole." [REDACTED] See *Pole Attachment Order*, 26 FCC Rcd at 5305 (¶ 150 n.453); see also Answer Ex. 4 at DEP000176.

⁷⁰ 47 C.F.R. § 1.1404(f).

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necessary to try to substantiate the rates it is charging.⁷¹ Duke Progress thus forced AT&T to file a pole attachment complaint to obtain the information that should have been part of a good faith effort to resolve this dispute. Having seen the information it has now provided, it confirms that AT&T could never negotiate a competitively neutral rate through negotiations with Duke Progress. As I explain below, Duke Progress seeks to perpetuate the far higher JUA rates based on alleged valuations that are divorced from reality and premised on an irrelevant and hypothetical “‘but for’ world in which AT&T did not enter into the Joint Use Agreement.”⁷²

C. Mr. Metcalfe’s Valuations Are Irrelevant and Fatally Flawed.

27. I have reviewed the affidavit submitted by Kenneth Metcalfe, which purports to demonstrate the value obtained by AT&T from the mere existence of the JUA. This, of course, does not speak to the only question that is relevant, which is whether the JUA provides AT&T a net material advantage over its competitors. But even beyond its irrelevance, each of Mr. Metcalfe’s valuation theories is fatally flawed.

28. Mr. Metcalfe does not clarify whether he intends his valuation theories to be mutually exclusive or cumulative.⁷³ But they cannot be cumulative, as they are both redundant and conflicting. They also inappropriately seek to embed one-time non-recurring expenses into an ongoing recurring rate, lack any reasonable link to reality or common sense, count the same flawed costs multiple times, and flatly ignore and violate principles that have long been established by the Commission. They should be rejected.

⁷¹ Answer ¶ 15.

⁷² See Answer Ex. A at DEP000252 (Freeburn Decl. ¶ 17).

⁷³ Answer Ex. E at DEP000359 (Metcalfe Decl., Ex. E-1).

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29. *First*, Mr. Metcalfe alleges that the evergreen clause in the JUA provides AT&T a “benefit of the bargain” that lets each party continue to use joint use poles after termination. This, Mr. Metcalfe says, means AT&T does not have to stand ready to deploy a pole network—alongside Duke Progress’s existing network—in the event Duke Progress were to terminate the JUA.⁷⁴ This hypothetical duplicative network is of course absurd. Mr. Metcalfe completely ignores the reality that dual pole lines are and have long been contrary to the public interest and the preference of state regulators, local jurisdictions and homeowners. Mr. Metcalfe nonetheless claims to value this spurious “benefit” by charging AT&T for “estimated avoided system replacement costs” that account for the cost “to procure and install poles.”⁷⁵ All the while, Mr. Metcalfe admits that the evergreen clause does *not* competitively advantage AT&T because “Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and CATVs.”⁷⁶ In recognizing that “ILECs are at a material disadvantage compared to CLECs and CATVs,”⁷⁷ Mr. Metcalfe concedes that his ridiculous theory is irrelevant.

30. *Second*, Mr. Metcalfe assumes that, without the JUA, Duke Progress would have constructed its own pole network or AT&T would, at unsourced and unproven present-day costs, pay “make-ready” to replace every Duke Progress pole on which AT&T is attached. This, of course, cannot be cumulative to Mr. Metcalfe’s prior theory because here he assumes that Duke Progress would have built its pole lines and then AT&T would have come along right behind and paid make-ready costs, including the cost of replacement poles. The theory has numerous flaws that further divorce it from reality. Two are particularly striking. First, Mr. Metcalfe ignores

⁷⁴ *Id.* at DEP000333 (Metcalfe Decl. ¶¶ 17-18).

⁷⁵ *See, e.g., id.* at DEP000359 (Metcalfe Decl., Ex. E-1).

⁷⁶ *Id.* at DEP000329 (Metcalfe Decl. ¶ 9).

⁷⁷ *Id.*

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that the network has developed over many decades, when pole costs were lower and when AT&T was paying far higher rental rates than its competitors. Mr. Metcalfe includes no offsets or adjustments to account for these realities. Instead, he posits that AT&T would invest [REDACTED] in pole replacement costs to replace about 16% of Duke Progress's distribution network (148,064 of Duke Progress's [REDACTED] distribution poles),⁷⁸ when Duke Progress's invested *less* in all of Duke Progress's [REDACTED] distribution poles as of the end of 2018.⁷⁹ Second, Mr. Metcalfe assumes that every pole would require pole replacement make-ready—meaning that there would never be a case in which rearranging facilities within the communications space could accommodate AT&T.⁸⁰ But the Commission found that “approximately 80 percent of current make-ready work is ‘simple’” make-ready that does not require a pole replacement.⁸¹ Mr. Metcalfe's valuation is thus not only fanciful, but grossly exaggerated.

31. *Finally*, Mr. Metcalfe seeks to charge AT&T for space in a manner that conflicts with the Commission's rate methodology that sets rates based on pole space occupied.⁸² This theory is inconsistent with his first valuation, as AT&T would not need to pay for any space on Duke Progress's poles if AT&T deploys its own pole line. It is also wrong. Mr. Metcalfe

⁷⁸ *Id.* at DEP000375 (Metcalfe Decl., Ex. E-4.1, line E); Answer Ex. D at DEP000315 (Harrington Decl., Ex. D-3, line 18).

⁷⁹ [REDACTED]

⁸⁰ See Answer Ex. E at DEP000375 (Metcalfe Decl., Ex. E-4.1) [REDACTED]

⁸¹ *Third Report and Order*, 33 FCC Rcd at 7714-15 (¶¶ 17-18 & n.64).

⁸² See Answer Ex. E at DEP000380-82 (Metcalfe Decl., Ex. E-5 – E-5A).

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ignores or is not aware of established FCC precedent that assigns the 3.33 feet of safety space to the electric utility.⁸³ He also departs from precedent in attempting to assign to AT&T 3 feet of space he says the JUA *implies* is allocated to AT&T, as the JUA does not include an express space allocation.⁸⁴ But “under the Commission’s rate formula, ‘space occupied’ means space that is ‘actually occupied’”⁸⁵—not simply allocated or—in this case—implied into the JUA by Duke Progress. There is good reason why the JUA does not allocate space to AT&T, as the Commission prohibits utilities from reserving pole space for attachers.⁸⁶ Mr. Metcalfe’s space valuations are thus fatally flawed and should be afforded no weight.

D. Duke Progress’s Claims about a 1972 Document Are Wrong and Outdated.

32. Duke Progress relies on an obsolete Bell System Practice, titled Division of Cost Methods in Formulation of Joint Use Agreements, and dated September 1972.⁸⁷ I disagree that this document establishes that the JUA rate methodology was ever just and reasonable. But it certainly cannot be disputed that the document does not establish that the JUA rate methodology is just and reasonable today. The document, which is 48 years old, could not possibly account for the significant business, regulatory, legal, and economic changes that have occurred since

⁸³ See *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (“the 40-inch safety space ... is usable and used by the electric utility”). But see Answer Ex. E at DEP000339-41 (Metcalfe Decl. ¶¶ 32-37).

⁸⁴ Answer Ex. E at DEP000342, DEP000348 (Metcalfe Decl. ¶¶ 38, 53).

⁸⁵ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); 47 C.F.R. § 1.1406(d)(2).

⁸⁶ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) (“1996 Implementation Order”) (“Permitting an [I]LEC, for example, to reserve space for local exchange service ... would favor the future needs of the [I]LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.”).

⁸⁷ Answer Ex. 6 at DEP000180-96.

1972. Many of the fundamental assumptions of that time have been superseded by statute and FCC rulings on costs and rates. Cable companies were not given the right to just and reasonable rates until 1978, CLECs did not enter the market until 1996, and the right of ILECs to just and reasonable rates was not recognized until 2011.

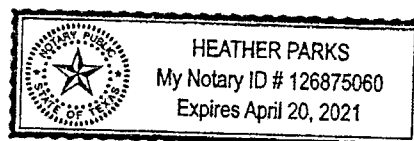
33. That the Bell System Practice is outdated is apparent from a review of Duke Progress's interrogatory responses in this complaint proceeding. Duke Progress relies on the Bell System Practice because it divides the entirety of the pole cost between just two attachers.⁸⁸ Duke Progress's Answer and interrogatory responses tell a different story. Duke Progress has agreements with [REDACTED] cable companies, [REDACTED] CLECs and [REDACTED] wireless providers⁸⁹ and 480,481 non-ILEC attachments on its poles.⁹⁰ The network of today bears little, if any, resemblance to the network on which Duke Progress relies when it seeks to perpetuate the outdated cost sharing methodologies of the pre-competition era.


Daniel P. Rhinehart

Sworn to before me on
this 17th day of December, 2020

Notary Public





⁸⁸ Answer ¶ 26.

⁸⁹ Duke Progress's Resp. to AT&T's Interrogs., Ex. 1 at DEP000003-04.

⁹⁰ Answer ¶ 12 n.39.

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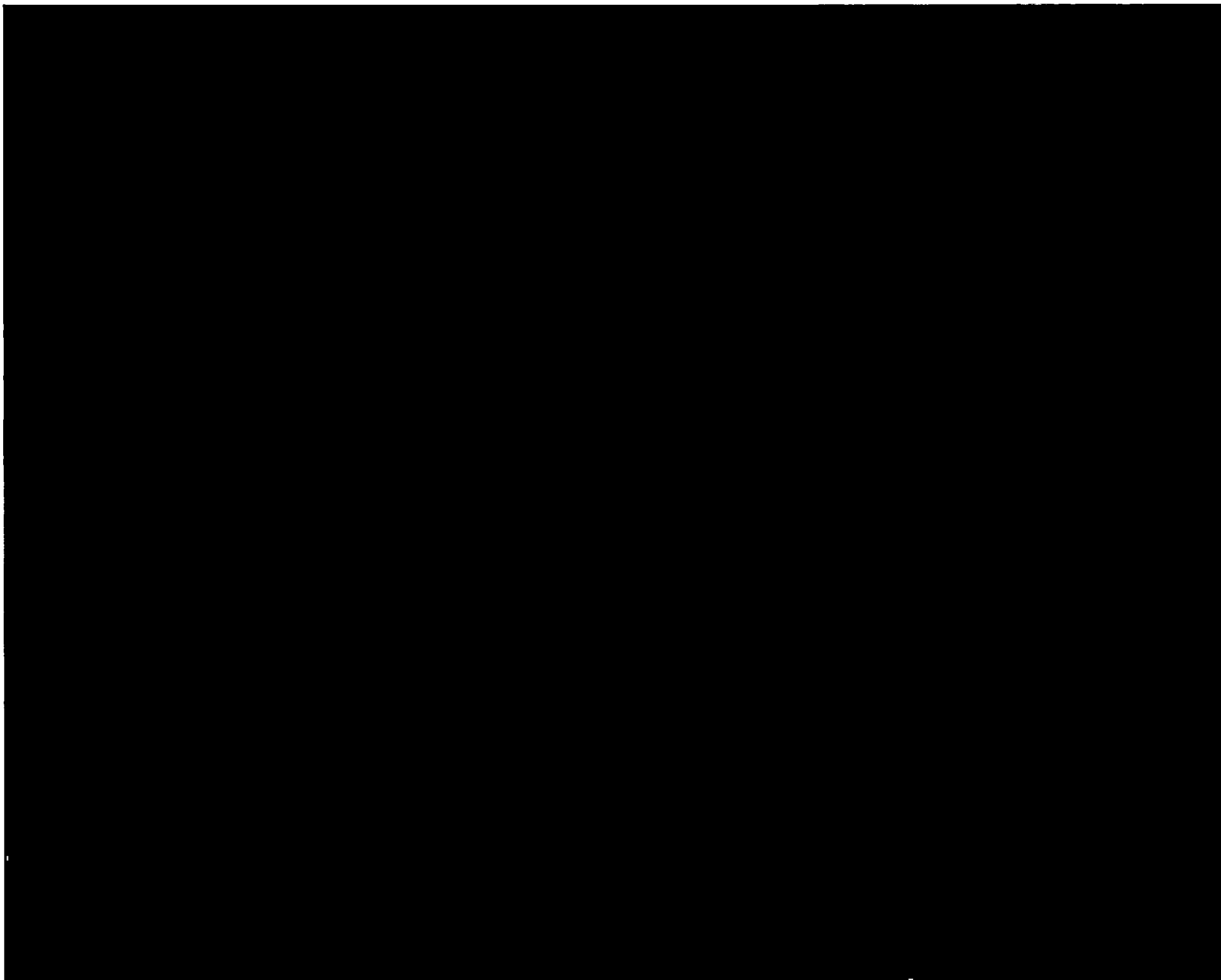
Exhibit R-5

ATT00367

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Exhibit R-5 (Page 1 of 2)

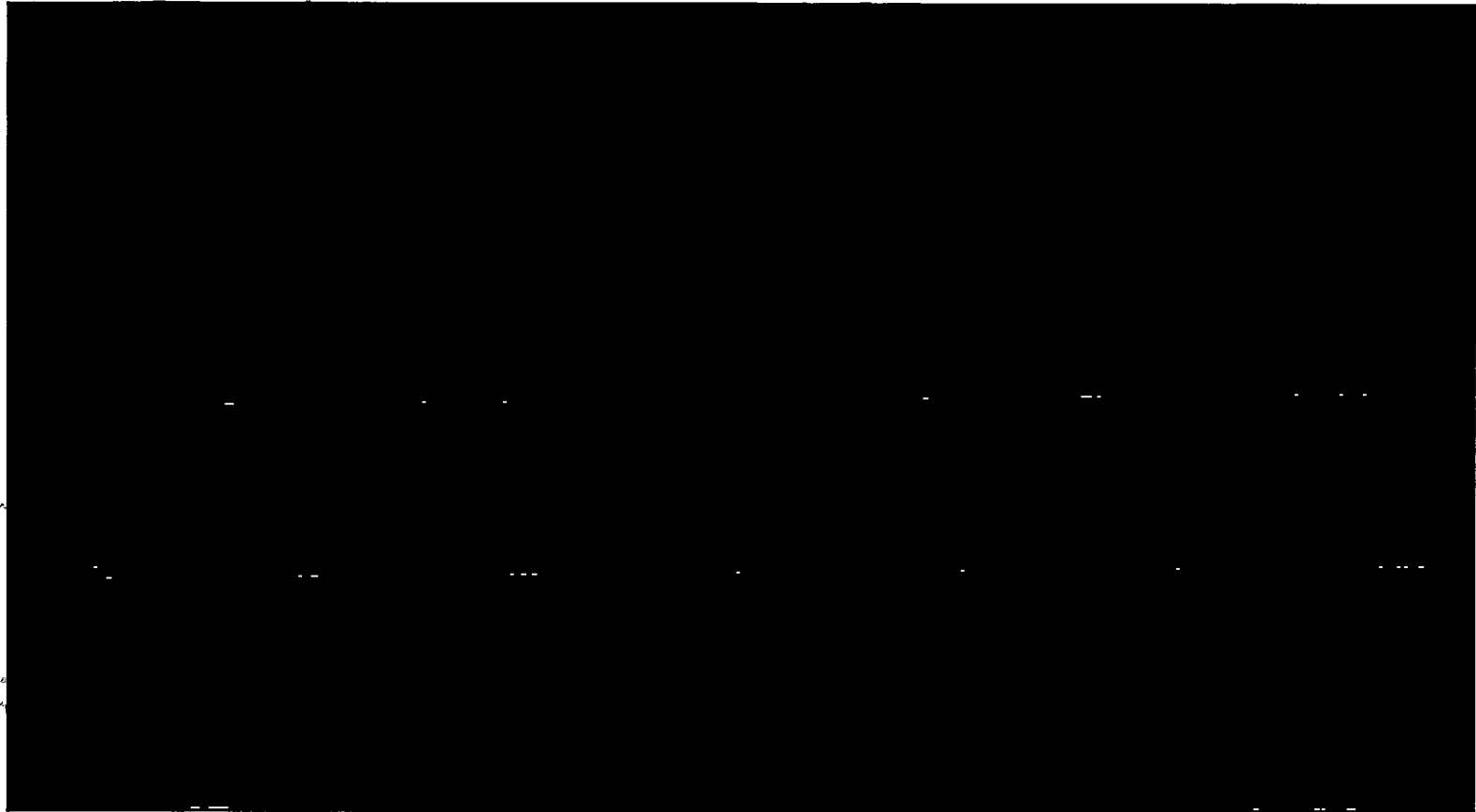
Rate Calculations - AT&T's Use of Duke Energy Progress's Poles - 2017-2020 Rental Years



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PUBLIC VERSION

Exhibit R-5 (Page 2 of 2)
Rate Calculations - AT&T's Use of Duke Energy Progress's Poles - 2017-2020 Rental Years



ATT00369


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Exhibit R-6

ATT00370

PUBLIC VERSION

Exhibit R-6
Weighted Average Cost of Capital



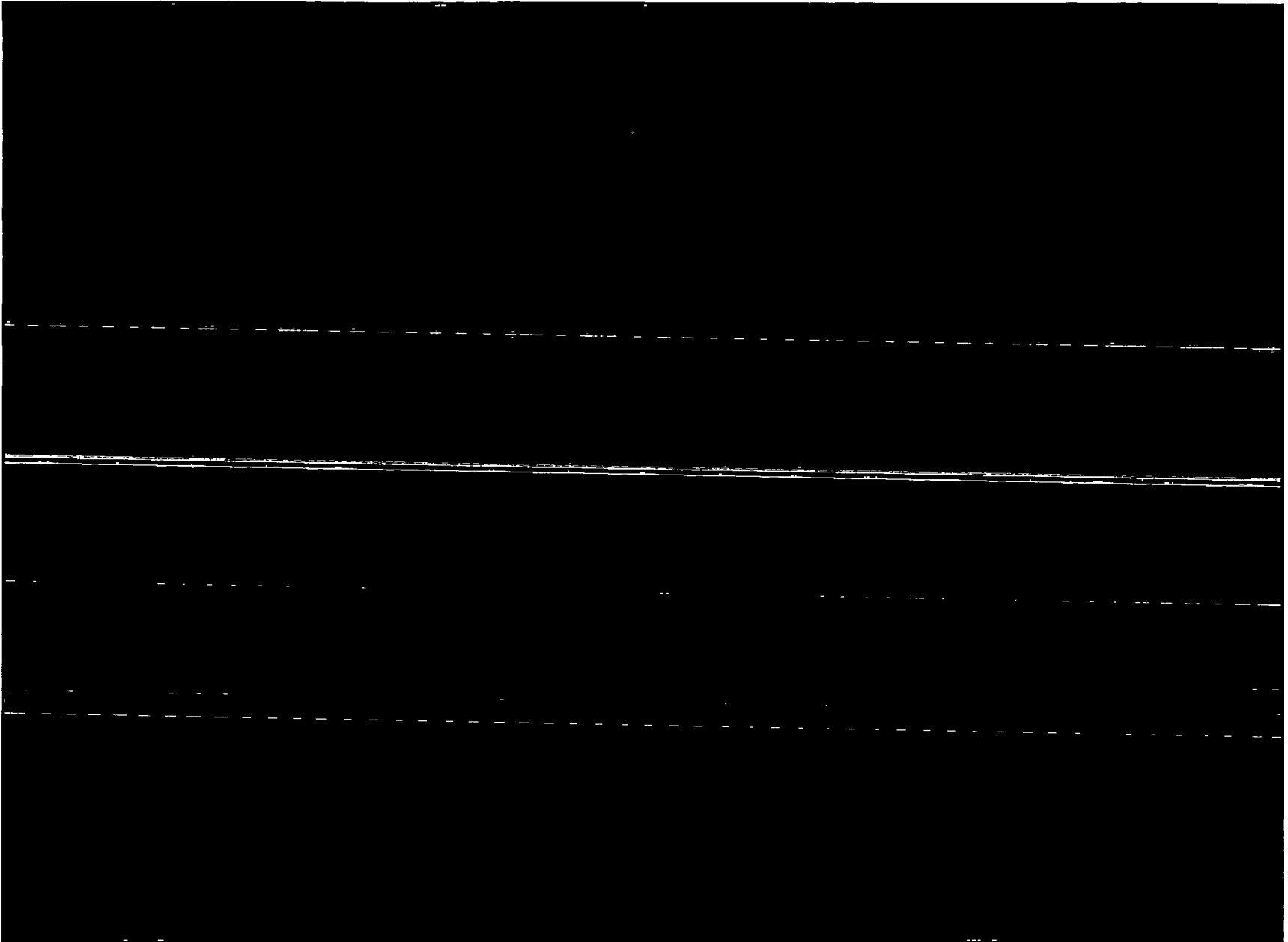
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Exhibit R-7

ATT00372

PUBLIC VERSION

Exhibit R-7
Assessment of Duke Energy Settlement Offer



ATT00373

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Reply Exhibit B

ATT00374

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statements about the parties' negotiations in Duke Progress's November 13, 2020 Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. I disagree with several statements Duke Progress made about our negotiations. *First*, I vehemently disagree with Duke Progress's unsupported claim that AT&T negotiated with Duke Progress in bad faith.² I think it is noteworthy that this allegation of bad faith is *only* in Duke Progress's Answer, and *not* mentioned in the Declarations filed by Mr. Freeburn and Mr. Hatcher, who attended both of our executive-level meetings. I approached, and at all times conducted, the negotiations with Duke Progress in good faith and I know that the rest of the AT&T negotiating team did as well. We were not able to reach a settlement, but I attribute that to Duke Progress's unwillingness to accept prior Commission precedent or ever proffer an offer promised for nearly nine months before this case was filed, and absolutely not to any bad faith or improper dealing by either party. Duke Progress's Answer is consistent with this conclusion, as it makes the same arguments on which it would not yield during our negotiations.

3. *Second*, Duke Progress is simply wrong when it claims that we approached the negotiations without the "level of vision and intellectual honesty that allows both parties an opportunity to achieve an efficient resolution of a dispute."³ From the beginning of the negotiations, we tried to make the negotiations *more* efficient by ensuring that they were informed by the relevant data and information.⁴ Understanding Duke Progress's costs and the

² See Answer ¶ 9.

³ *Id.*

⁴ See, e.g., Compl. Ex. 8 at ATT00204-205 ("To facilitate our discussions, we request that Duke Energy provide us its 2018 new telecom rate calculations ... so that we can all be better informed about the rental rate that AT&T is entitled to under federal law. Also, if Duke Energy believes

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terms and conditions of its license agreements is essential to successful negotiations under the Commission's regulations and orders because they are designed to "reduce the number of disputes' regarding pole attachment rates" by "enabl[ing] *better informed* pole attachment negotiations."⁵ Duke Progress instead wanted us to accept Duke Progress's word that AT&T should continue paying the JUA rates and trust that Duke Progress would be able to support its claims if litigation were filed.⁶ This is not the way to facilitate an informed settlement. And now having seen Duke Progress's Answer and supporting Declarations and Exhibits, it is clear that its claims were unfounded.

4. Unfortunately, Duke Progress is not alone in its wait-and-see approach, and it has complicated negotiations for AT&T and its affiliates nationwide, requiring the filing of far more pole attachment complaints than we expected or would prefer. Electric utilities routinely posture during our negotiations and make claims without reference to cost data, relevant agreement language, or prior precedent. It is essentially impossible to reach a settlement that is consistent with the Commission's regulations and orders⁷ when an electric utility withholds information during negotiations and requires a pole attachment complaint proceeding before it will make any

that a rate higher than the new telecom rate is justified by net competitive advantages, we request copies of Duke Energy's executed license agreements and all data and quantifications that support its claim.").

⁵ *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and Order*") (citation omitted) (emphasis added).

⁶ *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEP offered numerous valid reasons to retain the existing cost-sharing relationship Though DEP had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of the various competitive advantages, ... AT&T's 'not until you show me' approach is neither intellectually honest nor efficient.").

⁷ *See BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5327 (¶ 12) (EB 2020) ("*FPL 2020 Order*") ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.").

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attempt to collect much less disclose even a portion of the relevant information. Simply put, that is what happened here. (Duke Progress has still refused to provide more than 3 of its approximately 50 executed license agreements.)⁸

5. Also like many electric utilities, Duke Progress scuttled our negotiations by refusing to honor, respect, and abide by the Commission's prior rulings on issues central to our discussions. For example, the Commission expressly applied its new telecom rate presumption to existing agreements,⁹ but Duke Progress would only discuss a new telecom rate for "poles that are *not* already in joint use."¹⁰ The Commission set the pre-existing telecom rate as a "hard cap" on rates that may be charged ILECs to help provide certainty during negotiations and "limit pole attachment litigation."¹¹ But Duke Progress argued that AT&T should continue paying the JUA rates,¹² which are over [REDACTED] per pole *higher* than properly calculated pre-existing telecom rates—and up to [REDACTED] per pole *higher* than the inflated pre-existing telecom rates Duke Progress calculated for its Answer.¹³ The Commission amended its rules to ensure refunds would be

⁸ See Objection to AT&T's Interrogatory No. 3.

⁹ *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

¹⁰ Answer Ex. B at DEP000289 (Hatcher Decl. ¶ 17) (emphasis added). To clarify, Duke Progress was only willing to *discuss* new telecom rates for poles that are not already in joint use. Despite its contrary allegations, Duke Progress never made a formal offer that included new telecom rates for future poles, so there was no "proposal" for AT&T to consider or reject. See Answer ¶ 31.

¹¹ *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129).

¹² See Answer ¶ 9 (claiming Duke Progress "offered numerous ... reasons to retain the existing cost-sharing relationship" during "two separate face-to-face meetings between representatives of the parties").

¹³ See Answer ¶ 22; see Reply Ex. A at ATT00361-362 (Rhinehart Reply Aff. ¶ 26). After Duke Progress admitted in its November 13, 2020 Answer that it charges AT&T rates that far exceed even Duke Progress's inflated pre-existing telecom rate calculations, Duke Progress sent AT&T invoices for the 2020 rental year at the JUA rates. Duke Progress's invoices, which are dated December 7, 2020, are attached as Exhibit M-1.

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available for prior overpayments and expressly “decline[d] the invitation ... to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge.”¹⁴ But Duke Progress “made clear that retroactive refunds were a non-starter.”¹⁵

6. Duke Progress also refused to accept the Commission’s rulings on issues related to the benefits it relied on. It claimed that it built “taller and stronger poles than necessary to meet its own service obligations” to accommodate AT&T,¹⁶ but the Enforcement Bureau rightly recognized that electric utilities “did not build [their] poles just to accommodate AT&T” given that cable companies have required space on utility poles for more than 40 years and CLECs for nearly 25 years.¹⁷ Duke Progress said it “was a nonstarter” for Duke Progress to “bear[] the entire cost of the safety space,”¹⁸ even though the Commission has repeatedly held that “[t]he [safety] space is usable and used by the electric utilities.”¹⁹ And Duke Progress seeks to value AT&T’s access to Duke Progress’s poles at the cost of a full duplicative network,²⁰ when the Enforcement Bureau rejected a similar attempt to “calculate the monetary value of AT&T’s guaranteed access by assuming that, without the JUA, AT&T would have built a duplicate pole network.”²¹

¹⁴ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5290 (¶ 112) (2011) (“*Pole Attachment Order*”).

¹⁵ Answer Ex. B at DEP000291 (Hatcher Decl. ¶ 19).

¹⁶ *Id.* at DEP000284 (Hatcher Decl. ¶ 8).

¹⁷ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

¹⁸ Answer Ex. B at DEP000290 (Hatcher Decl. ¶ 18).

¹⁹ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citation omitted).

²⁰ Answer Ex. E at DEP000333 (Metcalf Decl. ¶ 18) (“To quantify this benefit, I have calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Progress”).

²¹ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

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7. Our negotiations with Duke Progress are a textbook example of why our efforts to negotiate just and reasonable rates have been so fruitless. We did not “merely dismiss[]” alleged advantages Duke Progress raised during our meetings.²² We instead discussed each issue raised and explained why we did not think it justified a rate higher than the new telecom rate under the Commission’s regulations and orders. In response, Duke Progress insisted we accept arguments the Commission has already rejected, preventing the parties from establishing even the most basic foundation from which to negotiate. On these terms, a deal was clearly not possible.

8. *Third*, I disagree with Duke Progress’s unsupported speculation that, “for all it appears, AT&T itself viewed the joint use agreement as just and reasonable until very recently.”²³ AT&T has long sought relief from the unjust and unreasonable rates imposed by electric utilities, including in the rulemaking proceedings that resulted in the FCC’s 2011 and 2018 Orders. Since those Orders were issued, AT&T gave the Enforcement Bureau time to decide some other cases and gave Duke Progress time to voluntarily conform its rates to the law. That is all. AT&T did not condone Duke Progress’s exceptionally high rental rates, which require significant reductions to ensure just and reasonable and competitively neutral rates in North Carolina and South Carolina.

9. *Finally*, I disagree that our request for just and reasonable rates seeks “to undermine the Joint Use Agreement” or torpedo “the potential for the joint use network to ... actually deploy wireline broadband to places that don’t already have it.”²⁴ As with so many of

²² See Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 13).

²³ Answer ¶ 23.

²⁴ Answer Ex. B at DEP000292 (Hatcher Decl. ¶ 21).

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Duke Progress's arguments, the Commission has rejected this one as well. "By keeping pole attachment rates unified and low, [the Commission will] further [its] overarching goal to accelerate deployment of broadband by removing barriers to infrastructure investment and promoting competition."²⁵ AT&T should pay the same fully compensatory new telecom rates its competitors are guaranteed.

Dianne W. Miller

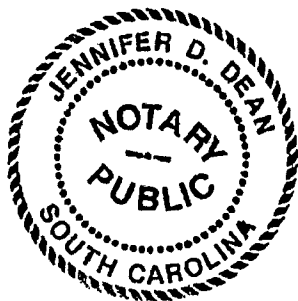
Dianne W. Miller

Sworn to before me on
this 17th day of December, 2020

Notary Public

Jennifer D. Dean

My Commission Expires
June 9, 2030



²⁵ *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13733 (¶ 4) (2015).

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Exhibit M-1

ATT00382

PUBLIC VERSION

INVOICE

Duke Energy Progress
P.O. Box 1551 (NC 4)
Raleigh, NC 27602

AHMED EL-GHAMRY
AT&T OF NORTH CAROLINA
675 WEST PEACHTREE ST
ROOM 34U16
ATLANTA, GA 30375

Invoice No: C45227
Invoice Date: 12/7/2020

For: AT&T
NORTH CAROLINA

| Description | For Period: 1/1/2020 - 12/31/2020 | Count | Rate | Charges |
|---|-----------------------------------|--|------|---------|
| ANNUAL CHARGE FOR TELEPHONE ATTACHMENTS ON P.E. | | 127977 | | |
| CREDIT FOR P.E. ATTACHMENTS ON TELEPHONE | | 26086 | | |
| | | Amount Due: | | |

Total Amount Due within 30 Days of Receipt of this Invoice
For billing questions call: (919) 546-2327

Please remit the stub below with payment

From: AT&T OF NORTH CAROLINA
675 WEST PEACHTREE ST
ROOM 34U16
ATLANTA, GA 30375

Invoice No: C45227
Invoice Date: 12/7/2020

Mail to: Duke Energy Progress
Joint Use
P.O. Box 1551 (NC 4)
Raleigh, NC 27602

Amount Due:

Treasury Credit to: 20104025 X PECO 99810 U258

Payment Amount: \$

ATT00383

PUBLIC VERSION

INVOICE

Duke Energy Progress
P.O. Box 1551 (NC 4)
Raleigh, NC 27602

AHMED EL-GHAMRY
AT&T SOUTH CAROLINA
675 WEST PEACHTREE ST
ROOM 34U16
ATLANTA, GA 30375

Invoice No: C45228
Invoice Date: 12/7/2020

For: AT&T
SOUTH CAROLINA

| Description | For Period: 1/1/2020 - 12/31/2020 | Count | Rate | Charges |
|---|-----------------------------------|--|------|---------|
| ANNUAL CHARGE FOR TELEPHONE ATTACHMENTS ON P.E. | | 20087 | | |
| CREDIT FOR P.E. ATTACHMENTS ON TELEPHONE | | 4512 | | |
| | | Amount Due: | | |

Total Amount Due within 30 Days of Receipt of this Invoice
For billing questions call: (919) 546-2327

Please remit the stub below with payment

From: AT&T SOUTH CAROLINA
675 WEST PEACHTREE ST
ROOM 34U16
ATLANTA, GA 30375

Invoice No: C45228
Invoice Date: 12/7/2020

Mail to: Duke Energy Progress
Joint Use
P.O. Box 1551 (NC 4)
Raleigh, NC 27602

Amount Due:

Treasury Credit to: 20104025 X PECO 99810 U258

Payment Amount: \$

ATT00384

Reply Exhibit C

PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-293
Bureau ID No. EB-20-MD-004

REPLY AFFIDAVIT OF MARK PETERS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF TARRANT)

I, Mark Peters, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T"). As Area Manager – Regulatory Relations, I support AT&T and AT&T-affiliated entities with respect to regulatory, legislative, and contractual matters involving joint use, utility poles, conduit, and ducts. I executed a prior Affidavit dated August 31, 2020 in support of AT&T's Pole Attachment Complaint against Duke Energy Progress, LLC ("Duke Progress").¹ I am executing this Reply Affidavit to correct certain statements made by Duke Progress in its October 30, 2020 Answer and by Mr. Freeburn, Mr. Hatcher, and Mr. Burlison in

¹ Compl. Ex. C at ATT00035-48 (Aff. of M. Peters, Aug. 31, 2020).

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their Declarations. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. As I stated in my prior Affidavit, I have over two decades of experience with AT&T-affiliated entities, which I refer to collectively as the “Company.” For the past decade, I have been a subject matter expert on issues relating to the Company’s joint use relationships with electric companies and since 2013, I have also provided support on matters relating to third-party access to Company-owned utility poles and conduit.

A. Duke Progress Incorrectly Describes Our Negotiations.

3. As the subject matter expert on issues relating to AT&T’s joint use relationships, I have supported AT&T’s effort to negotiate just and reasonable rates with Duke Progress since the negotiations began. I attended both of AT&T’s executive-level meetings with Duke Progress and strongly dispute the characterization in Duke Progress’s Answer that my participation, and the participation of the other team members representing AT&T, was in bad faith.² I approached each meeting optimistic that we could have a productive discussion, particularly if Duke Progress provided an offer and the information we requested to inform our conversations. Instead, Duke Progress did not make an offer at either meeting and did not provide any license agreements or data to substantiate its claim that the JUA provides AT&T a net material competitive advantage relative to its license agreements. Duke Progress also remained resolute during the meetings that any negotiated settlement would need to ignore Commission precedent, such as the Commission’s longstanding allocation of the “safety space” on a pole to electric

² See Answer ¶ 9.

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utilities. Nonetheless, I found the discussions cordial, professional, and thorough. As a result, the allegation of Duke Progress's lawyers that we did not approach the negotiations with the "level of vision and intellectual honesty" that good faith negotiations require³ is completely off base. AT&T's "vision" for a settlement did not need to include a willingness to ignore settled FCC rate-setting principles.

4. Duke Progress also claims that I "dogmatically contended" during our meetings that certain terms in the JUA were reciprocal terms that eliminated any "net" value to AT&T.⁴ Not so. Instead, I made the simple point—which Duke Progress itself accepts—that reciprocal terms can "cancel each other out."⁵ Duke Progress wants that cancellation to *always* be proportional to the number of poles owned by each party. But, as I explained during our meetings, many JUA terms have an equal effect on Duke Progress and AT&T irrespective of pole ownership numbers. For example, a provision that applies to each facility a company has on a joint use pole (for example, an insurance provision) has a complete canceling effect because, by definition, both parties have facilities on every joint use pole. In explaining this point, I did not "merely dismiss[]" anything Duke Progress's executives said "with unconsidered talking points."⁶ I instead sought to move the conversation forward and ensure Duke Progress understood our position on each issue should a deal prove impossible.

5. Duke Progress's Answer has now confirmed that a deal was not possible during our executive-level meetings or in the nearly 9 months we waited (until September 2020) for a promised rate proposal after providing data in December 2019 that Duke Progress requested.

³ Answer ¶ 9.

⁴ See, e.g., Answer, Executive Summary at ii; Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 13).

⁵ Answer, Executive Summary at i.

⁶ Answer ¶ 28 n.128; Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 13).

Mr. Freeburn says that Duke Progress “would never have negotiated the Joint Use Agreement ... if the most [Duke Progress] could recover from AT&T in return was the one-foot CATV or telecom rate (old or new).”⁷ But that is the exact range of rates required by federal law, with the new telecom rate the presumptive rate and the pre-existing (or old) telecom rate a “hard cap” where a utility can rebut the presumption. It is unfortunate that Duke Progress is unwilling to accept the Commission’s regulations and orders, which were designed to facilitate negotiations and eliminate the need for this costly and time-consuming pole attachment litigation.

B. Duke Progress Has Not Identified, Let Alone Proven, a Net Material Competitive Advantage.

6. Nothing in Duke Progress’s Answer changed my conclusion that the JUA does not include more advantageous terms and conditions for AT&T than those that apply to AT&T’s competitive local exchange carrier (“CLEC”) and cable competitors. Consequently, AT&T should pay the same pole attachment rate as its CLEC and cable competitors. Duke Progress attached just 1 cherry-picked and redacted license agreement to its Answer and quoted just 1 provision from it.⁸ In reaching my conclusions, I also considered the terms and conditions in the other 2 license agreements Duke Progress produced in response to AT&T’s interrogatories out of its set of approximately 50 license agreements.⁹

7. Duke Progress does not focus on the terms and conditions of its license agreements because it instead defends the JUA based primarily on an argument that the JUA provides value to AT&T as compared to a hypothetical world in which companies did not jointly

⁷ Answer Ex. A at DEP000257 (Freeburn Decl. ¶ 26).

⁸ See Answer Ex. 7 at DEP000198-261 (License Agreement); Answer ¶ 30 (quoting License Agreement § 17).

⁹ See Objection to AT&T’s Interrog. No. 3; Resp. to AT&T’s First Set of Interrog., Ex. 2 at DEP000006-110.

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use utility poles.¹⁰ That comparison is not relevant, however, to whether AT&T enjoys net material benefits relative to AT&T's competitors that also use Duke Progress's poles. Much of Duke Progress's argument is, therefore, beside the point. It is also wrong and based on allegations the Commission has already rejected. This is particularly apparent in a review of the 5 alleged competitive "advantages" that Duke Progress thinks are "of consequence."¹¹

8. *First*, Duke Progress argues that it "built (and maintains) a network of poles taller and stronger than necessary to provide electric service specifically to accommodate AT&T."¹² I supported AT&T's effort to rebut this same flawed claim in another dispute where the Enforcement Bureau agreed that the electric utility "did not build its poles just to accommodate AT&T."¹³ Cable companies and CLECs have *also* required space on utility poles for decades. Duke Progress's poles are no exception. Duke Progress's interrogatory responses show that nearly [REDACTED] cable company and CLEC attachments on Duke Progress's poles are governed by agreements that *pre-date* the JUA—nearly [REDACTED] the number of Duke Progress poles covered by the JUA.¹⁴

¹⁰ See, e.g., Answer ¶ 16 n.58 (claiming that "[a] case such as this requires the finder [of] fact to ascertain what the parties would have done in the absence of the joint use agreement."); Answer Ex. A at DEP000252 (Freeburn Decl. ¶ 17) ("In the 'but for' world in which AT&T did not enter into the Joint Use Agreement..."); Answer Ex. B at DEP000284 (Hatcher Decl. ¶ 8) ("In other words, in the absence of the partnership with AT&T...").

¹¹ See Answer ¶¶ 8, 15.

¹² Answer, Executive Summary at i; see also, e.g., Answer Ex. A at DEP000249 (Freeburn Decl. ¶ 11) ("Because of the Joint Use Agreement ..., DEP's network of distribution poles was built specifically to accommodate AT&T.").

¹³ See *BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 15) (EB 2020) ("*FPL 2020 Order*").

¹⁴ See Resp. to AT&T's First Set of Interrog., Ex. 1 at DEP000003-04 (stating that [REDACTED], and that 148,064 AT&T attachments are covered by the JUA entered in 2000).

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9. Duke Progress nonetheless claims that AT&T was advantaged by Duke Progress's installation of poles that can accommodate a communications attacher because AT&T did not need to "pay make-ready cost to replace nearly every [Duke Progress] pole to which it is attached."¹⁵ This argument is about joint use itself—not the JUA, which was entered in 2000 when AT&T was already attached to more than 125,000 Duke Progress poles.¹⁶ It ignores the fact that Duke Progress did not need to pay make-ready cost to replace AT&T poles to which it attached and similarly ignores that AT&T's competitors did not need to replace every Duke Progress pole either. Mr. Hatcher imagines that cable companies would have replaced Duke Progress's poles in an "alternate universe" in which "a CATV with a pole license agreement had been the first communications company to make attachments to [Duke Progress]'s poles."¹⁷ This is absurd. In Mr. Burlison's discussion of "typical" Duke Progress construction *without* AT&T or any other third party attached, he describes a 40-foot pole.¹⁸ A 40-foot pole is more than sufficient to hold communications facilities for AT&T and its competitors without requiring a pole replacement or significant make-ready.¹⁹ In fact, the JUA contemplated that poles shorter

¹⁵ Answer Ex. A at DEP000250 (Freeburn Decl. ¶ 12).

¹⁶ Compl. Ex. B at ATT00027 (Miller Aff. ¶ 7).

¹⁷ Answer Ex. B at DEP000288 (Hatcher Decl. ¶ 15).

¹⁸ Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14). If "typical" Duke Progress construction *without* AT&T attached involves a 40-foot pole, it is simply not possible to conclude that Duke Progress would "have installed 30 or 35-foot poles" but for AT&T and the JUA. *See id.* (Burlison Decl. ¶¶ 12, 14).

¹⁹ *See, e.g.*, Reply Ex. D at ATT00420, ATT00417 (Dalton Reply Aff. ¶¶ 13, 19); Reply Ex. E at ATT00427, ATT00430 (Oakley Reply Aff. ¶¶ 8, 14). Accepting Duke Progress's assumption that poles require 18 feet of ground clearance measured on the pole (an assumption that is highly fact-specific, as I explain below), a 40-foot pole, with 6 feet underground, 3.33 feet of safety space, and the additional 8 feet of space Mr. Burlison says Duke Progress uses, *see id.*, would still have almost 5 feet of space for communications attachers, which each require just about 1 foot of space, *see* 47 C.F.R. § 1.1410.

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than 40-feet could accommodate Duke Progress and possibly other communications attachers,²⁰ as a 35-foot pole can and frequently does.²¹ Indeed, the Commission assumes a 37.5-foot pole can accommodate Duke Progress and 4 communications attachers.²²

10. Available data shows that Duke Progress's poles should not regularly require replacement to accommodate an additional communications facility. In a September 2020 filing made by Duke Progress's parent company, a group of electric utilities stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility.²³ That is consistent with my experience. It also bears mentioning that, if an existing Duke Progress pole must be replaced to accommodate an additional communications facility, it does not matter whether the additional facility is AT&T's or AT&T's competitor's. As a result, AT&T, like its competitors, must replace poles owned by Duke Progress when necessary to accommodate an additional facility and must compensate Duke Progress for the pole replacement. AT&T is not competitively advantaged.

11. *Second*, Duke Progress claims AT&T is competitively advantaged because it has a "contractual right to remain attached to [Duke Progress]'s poles even in the event of

²⁰ Compl. Ex. 1 at ATT00094 (JUA, Art. I.K) (defining a "Standard Joint Use Pole" as 40 feet and such definition "is not intended to preclude the use of joint poles shorter than the Standard Joint Use Pole in locations where such poles will meet the known or anticipated requirements of the parties").

²¹ *See also* Reply Ex. D at ATT00417 (Dalton Reply Aff. ¶ 13). Mr. Burlison also states that Duke Progress could install a 35-foot pole if the clearance requirement was 15.5 feet. Accepting the accuracy of these assumptions—a 35-foot pole, with 6 feet underground, 3.33 feet of safety space, and the additional 8 feet of space Mr. Burlison says Duke Progress uses, *see* Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14)—would still leave space on the pole for about 3 communications attachers.

²² 47 C.F.R. §§ 1.1409(c), 1.1410.

²³ *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Sept. 2, 2020).

termination.”²⁴ But this is a competitive *disadvantage* for AT&T. AT&T’s competitors have a statutorily guaranteed right to attach to, and remain attached to, Duke Progress’s poles. Duke Progress’s witness agrees that this difference places “ILECs ... at a material disadvantage compared to CLECs and CATVs.”²⁵ Duke Progress nonetheless asks the Commission to ignore the disadvantage—and treat it like an advantage—because Duke Progress “cannot control what Congress gives or does not give to CATVs and CLECs.”²⁶ But the disadvantage still exists. It must be accounted for in a proper analysis of competitive neutrality.

12. Duke Progress also repeats the error of other electric utilities in claiming that this alleged advantage should be valued “by assuming that, without the JUA, AT&T would have built a duplicate pole network.”²⁷ Duke Progress, for example, claims that AT&T could have built its own network instead of entering into the JUA, and that AT&T can remove its facilities from Duke Progress’s poles at any time to avoid the excessive JUA rates.²⁸ These are fictions—commonly advanced by electric utilities to avoid reducing rental rates to comply with the law. The fact is that a single pole line was created in large part because municipalities and property owners wanted efficiency in the use of their rights-of-way and wanted to avoid communities having a forest of utility poles. That remains true today, as is readily apparent from the

²⁴ Answer, Executive Summary at ii; *see also, e.g.*, Answer Ex. A at DEP000255 (Freeburn Decl. ¶ 22); Answer Ex. B at DEP000288 (Hatcher Decl. ¶ 16).

²⁵ Answer Ex. E at DEP000329 (Metcalf Decl. ¶ 329).

²⁶ Answer ¶ 30 n.136.

²⁷ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see, e.g.*, Answer, Executive Summary at ii (“This ... perpetual license eliminates the need (or even the contingency) of constructing a new network of 148,000 poles in the event of a termination.”).

²⁸ *See* Answer, Executive Summary at ii-iii (“AT&T ... can choose at any time to remove its facilities from [Duke Progress]’s poles”); *see also, e.g., id.* ¶¶ 11, 27; Answer Ex. E at DEP000333 (Metcalf Decl. ¶ 18).

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accelerated adoption of municipal ordinances regulating use of the public rights-of-way by communications attachers. Homeowners and local authorities do not want two pole leads on one street, if they can be avoided. And setting the aesthetic issues aside, it is inconceivable that state regulators over the past century would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build two duplicative pole lines instead of a single shared network.

13. In any case, AT&T must rely on Duke Progress's infrastructure to provide service in North Carolina and South Carolina. This is another reason why Duke Progress's claim that the evergreen provision in the JUA is an advantage to AT&T is so inappropriate.²⁹ If the JUA terminates, AT&T will not be able to attach to new Duke Progress pole lines and will have to gain approval for alternate infrastructure from the same local authorities and residents that do not want duplicative utility poles. In contrast, AT&T's CLEC and cable competitors have a statutory right to attach and maintain attachments to Duke Progress's poles—and their right of access does not end with the termination of a license agreement. The contractual right of access that AT&T must negotiate and secure is thus a significant competitive *disadvantage* as compared to the statutory right of access enjoyed by its competitors.

14. *Third*, Duke Progress claims that AT&T is advantaged by space on a pole that AT&T does not and cannot use. Duke Progress tries to confuse the issue by inaccurately claiming that AT&T is “constructively” occupying more than the 1 foot of space that is typically occupied, on average, by communications facilities.³⁰ This argument should also be rejected outright. Duke Progress admits its claim rests entirely on a continuing refusal to accept the

²⁹ See, e.g., Answer ¶ 30.

³⁰ See, e.g., Answer ¶ 12.

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Commission's longstanding precedent that "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied.'"³¹

15. Duke Progress first claims that AT&T requires 3.33 feet of safety space, but the FCC has already found that that space is used by electric utilities and should not be charged to communications attachers.³² This makes sense because the safety space is regularly used for power company attachments. Mr. Freeburn and Mr. Burlison agree that Duke Progress has historically placed streetlights within the safety space.³³ Duke Progress admits it cannot charge CLECs or cable companies for this space.³⁴ It would defeat the principle of competitive neutrality to charge AT&T, but not its competitors, for safety space that none of them can occupy. Indeed, Duke Progress's attempt to assign the safety space on its poles to AT&T (and only AT&T) is particularly curious because AT&T's facilities are not usually adjacent to the safety space, but Duke Progress's facilities always are.

16. Duke Progress also claims that AT&T should be assigned *additional* space based on where AT&T's facilities are affixed to a pole, even if AT&T does not use the space. It claims that, if AT&T does not place its facilities at the absolutely lowest location permissible on a pole,

³¹ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing precedent); *see also, e.g.*, Answer ¶ 25; Answer Ex. 4 at DEP000173 [REDACTED]

³² *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("The communication space should not be attributed to AT&T because ... AT&T's attachments do not actually occupy the communications safety space."); *see also Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) (stating that "the 40-inch safety space is usable and used by the electric utility").

³³ Answer Ex. A at DEP000252-253 (Freeburn Decl. ¶ 18); Answer Ex. C at DEP000297 (Burlison Decl. ¶ 9).

³⁴ Answer ¶ 12 n.38 ("the Commission has already determined that CATV and CLEC attachers should not bear this cost ...").

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the unoccupied space *below* AT&T's facilities should be considered "actually occupied" space, and so alleges that AT&T "actually occupies" [REDACTED] feet of space. This is wrong for many reasons, not least of which is the fact that "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied.'"³⁵ AT&T, by definition, does not "actually occupy" space that is below its physical attachment to the pole.

17. Duke Progress's argument also incorrectly presumes that other communications facilities cannot be placed on a pole below AT&T's facilities. This does not comport with reality: Duke Progress admits that AT&T has encouraged the placement of wireless communications facilities *below* AT&T's wireline attachments³⁶ and Mr. Burlison admits there may be "other third-party attachments beneath AT&T" on a pole.³⁷ Moreover, AT&T also routinely lowers its facilities to make additional room for another company's higher located facilities on a Duke Progress pole, many of which are placed more than 12 inches from AT&T's facilities. But, there is no indication that Duke Progress charges those facilities' owners higher pole attachment rates because their facilities could have been placed closer to AT&T's.

18. Duke Progress's [REDACTED]-foot space measurement is also purely hypothetical. Duke Progress did not measure the space occupied by AT&T's facilities on any real-world pole. Instead, Mr. Freeburn claims that, during the "third-party pole attachment process," its contractor reviewed 1,039 poles, reflecting about 0.7% of the 148,064 Duke Progress poles to which AT&T is attached,³⁸ and reported that AT&T's highest attachment was affixed to the pole at a height

³⁵ *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing precedent).

³⁶ Answer ¶ 18.

³⁷ Answer Ex. C at DEP000300 (Burlison Decl. ¶ 17).

³⁸ Answer Ex. A at DEP000250 (Freeburn Decl. ¶ 13); Compl. Ex. 3 at ATT00163 (2019 NC Invoice); Compl. Ex. 4 at ATT00167 (2019 SC Invoice).

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█ feet above ground.³⁹ Duke Progress did not produce the underlying data or even identify the location of the 1,039 poles, making it impossible to verify this measurement. Duke Progress’s lawyers then paired the █-foot measurement with a *presumption* that poles require “an average 18 feet for minimum ground clearance” to extrapolate a █-foot constructive occupancy for AT&T on and around its facilities.⁴⁰ Needless to say, this mathematical exercise does not prove the *actual* amount of space occupied on any real-world pole AT&T uses.

19. The 18-foot presumption for ground clearance cannot be used to accurately determine space occupied on a specific pole. It reflects an average of highly variable site-specific ground clearance requirements. The ground clearance required at a particular pole depends on variety of factors, including topography and what is below the aerial facilities—a road, highway, railroad tracks, sidewalk, driveway, waterway, wooded area, parking lot, etc.

20. Duke Progress is also wrong when it equates an 18-foot minimum ground clearance presumption with the “lowest point of attachment” on a pole.⁴¹ If a pole is located next to an elevated road, for example, an attachment would need to be higher than 18 feet on the pole to maintain the required clearance above the elevated road. This is particularly true in the parties’ mountainous serving areas. Because Duke Progress’s █-foot extrapolation depends on the 18-foot ground clearance presumption, this █-foot allegation is pure conjecture. Duke Progress has not proven the space actually occupied by AT&T’s physical attachment on any Duke Progress pole.

³⁹ Answer Ex. A at DEP000250 (Freeburn Decl. ¶ 13).

⁴⁰ (█ – 18 = █). See Answer ¶ 12 & n.36.

⁴¹ See Answer ¶ 12 & n.36.

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21. Mr. Hatcher faults me for not providing alternate data that establishes the space occupied by AT&T's facilities across 148,000+ Duke Progress poles.⁴² But the Commission adopted the presumption that communications attachments occupy 1 foot of space on a pole to *avoid* the need for costly pole surveys every time rates are set. If Duke Progress wants to rebut the presumption, it needs credible, actual data about AT&T's facilities across its network—not a ■■■-foot extrapolation patched together from a presumption and what it claims its contractor reported about a small unidentified set of poles.

22. I also disagree with Mr. Freeburn's suggestion that AT&T places its facilities higher on a pole because of midspan sag in AT&T's cables (i.e., sag between two poles).⁴³ In my experience, the placement of AT&T's facilities is more typically an effort to accommodate the preference of electric utilities and local authorities for higher aerial facilities.⁴⁴ AT&T then lowers its facilities when possible to accommodate another attaching entity.

23. I also disagree that AT&T's facilities have more midspan sag than other aerial facilities on a pole. Midspan sag is not unique to AT&T. All aerial facilities include some sag midspan, but that sag could be 50 feet or more from a pole, and so it does not change the space actually occupied on the pole. Mr. Freeburn provides a wholly unsupported allegation that Duke Progress's "data indicates that the average midspan sag for AT&T's attachments is ■■■." ⁴⁵ It is impossible to know how he arrived at this number. It is also meaningless as a comparison

⁴² See Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 14).

⁴³ Answer Ex. A at DEP000251 (Freeburn Decl. ¶ 15).

⁴⁴ See, e.g., *In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6468 (¶ 23) (2000) (noting that electric utilities argued that "the lowest attachment on a pole must be at least 19'8" from the ground").

⁴⁵ Answer Ex. A at DEP000251 (Freeburn Decl. ¶ 15).

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with other companies' facilities without data about the midspan sag of every other company's aerial facilities, including Duke Progress's.

24. Mr. Freeburn takes issue with my description of AT&T's facilities, claiming that they are "not like the tensioned messengers of CATVs and CLECs" based on photos of 2 of the more than 148,000 Duke Progress poles with AT&T facilities attached.⁴⁶ This is absurd. AT&T installs light-weight copper and fiber optic cables that are comparable in size to the facilities of AT&T's competitors when viewed across the network as a whole, and engineers its facilities to limit mid-span sag.⁴⁷ Mr. Freeburn also effectively agrees that the facilities of AT&T and its competitors *are* comparable. He says that the largest of AT&T's facilities are "*among the largest, and heaviest, horizontally run cables*" on Duke Progress's poles.⁴⁸ In other words, they are not unique. Indeed, as a pole owner, AT&T is aware that the coaxial cables used by cable companies are increasingly being overlashed multiple times, which increases their bundle size, thickness, and weight. AT&T's facilities are comparable in size to its competitors' facilities, which are presumed to occupy 1 foot of space.⁴⁹

25. Mr. Freeburn's criticism of AT&T's "copper cables" appears to be grounded in outdated stereotypes about the heavy copper cables that AT&T deployed a century ago. But not all copper cables are the same, and much of the copper AT&T has deployed on Duke Progress's poles is lightweight cable, comparable in size to cable used by AT&T's competitors, including the coaxial cables used by cable companies that have a copper-clad core. AT&T has also

⁴⁶ *Id.* (Freeburn Decl. ¶ 14).

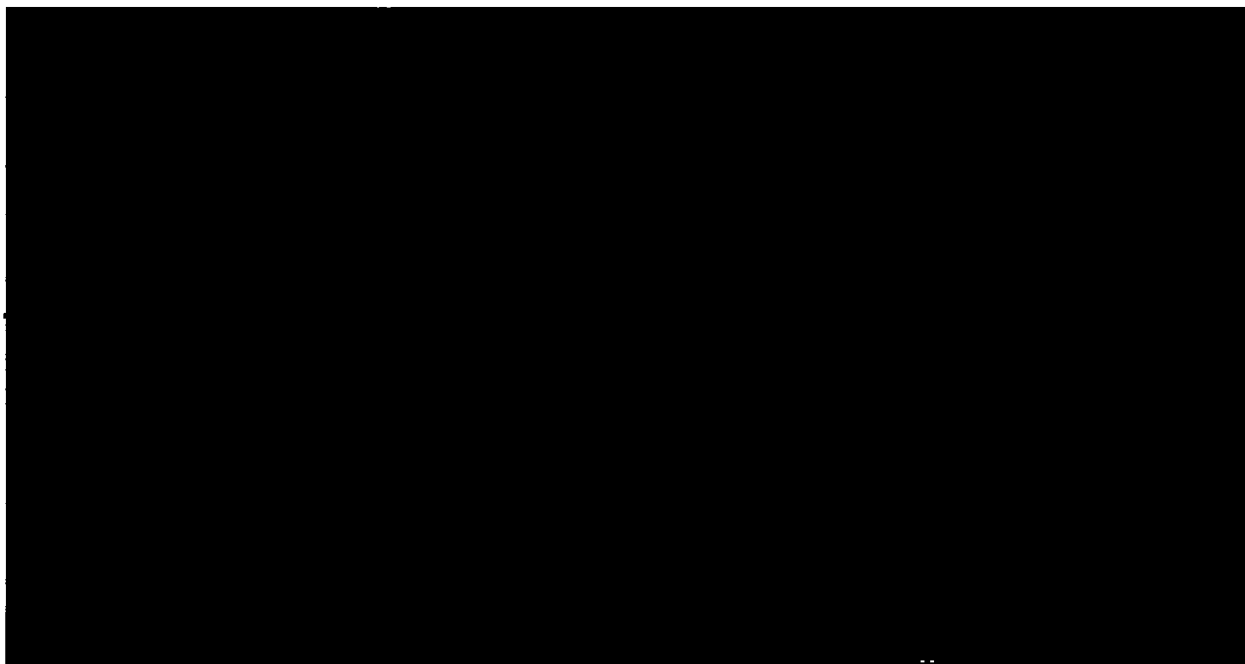
⁴⁷ *See, e.g.*, Reply Ex. D at ATT00418-419, ATT00421 (Dalton Reply Aff. ¶¶ 16, 21); Reply Ex. E at ATT00428-429 (Oakley Reply Aff. ¶¶ 11, 13).

⁴⁸ *Id.* (Freeburn Decl. ¶ 15) (emphases added).

⁴⁹ *See also* Reply Ex. D at ATT00418-419, ATT00421 (Dalton Reply Aff. ¶¶ 16, 21); Reply Ex. E at ATT00428-429 (Oakley Reply Aff. ¶¶ 11, 13).

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devoted substantial resources in recent years to the deployment of thin, lightweight fiber cables. The following graphs illustrate this transition by comparing the amount (in feet) of AT&T's annual aerial copper placements (green) to the amount of its annual aerial fiber placements (black) from 1990 to 2020 in North Carolina and South Carolina:



26. AT&T's network thus continues to significantly change and require less space on Duke Progress's poles. This is because on new pole lines, almost without exception, AT&T places only lightweight fiber cables (and not copper cable) and on existing pole lines typically places copper cable only when needed to repair the copper cable network that has not yet transitioned to fiber. As more sections of the network transition to fiber, this decline in copper placements will continue. And on these copper cable replacements, AT&T engineers size replacement sections (*i.e.*, determine how many cable pairs are needed) based on the number of working circuits, which minimizes the size (*i.e.*, diameter and weight per foot) of the replacement, or new, cable. This trend of using less pole space will undeniably continue due to the abandonment of copper-based communications services by customers, resulting in significant

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reductions in the size and weight of copper cables in AT&T's network. There is, therefore, no good reason (much less any evidence on which) to differentiate the size of AT&T's cables from its competitors.

27. Duke Progress also points to the allocation of 3 feet of space to AT&T in the "preceding joint use agreement," arguing that it should justify charging AT&T a higher rate.⁵⁰ The parties' 1977 agreement was replaced by the current JUA, which has no space allocation, so the whole argument is nonsense. In any event, AT&T does not need, want, or use 3 feet of space across Duke Progress's poles for its existing facilities, for future facilities, or for any other purpose, and it cannot sublet space to others. It makes complete sense that the JUA the parties entered into in 2000 does not contain a space allocation because the Commission decided nearly a quarter century ago that such space reservations are unlawful.⁵¹ Duke Progress also does not reserve 3 feet of space on its poles for AT&T's exclusive use because its license agreement shows that Duke Progress lets third parties attach within 1 foot of AT&T's facilities.⁵² AT&T should pay pole attachment rates that are calculated, like its competitor's rates, based on the 1 foot of space AT&T presumptively occupies on a pole.

28. *Fourth*, Duke Progress claims AT&T is advantaged because "AT&T is not required to submit a permit when making a new attachment" to Duke Progress's poles.⁵³ This is

⁵⁰ See, e.g., Answer ¶ 12 (citing the parties' 1977 agreement, which was replaced by the current JUA).

⁵¹ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service ... would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

⁵² See Answer Ex. 7 at DEP000239 (License Agreement).

⁵³ Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20); see also Answer ¶¶ 8, 10, 14, 17.

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certainly not a *net* benefit because Duke Progress is also not required to submit a permit application when seeking to attach to AT&T's poles, and Duke Progress does not allege that the parties deploy materially different numbers of new facilities each year. It also is not a competitive benefit. Mr. Freeburn describes the advantage to AT&T as a paperwork and timing advantage—he says “AT&T is not required to submit” permitting paperwork to Duke Progress and does not need to “wait[] any period of time for DEP to perform each of the steps in the permitting process.”⁵⁴ These are not competitive advantages for reasons I detailed previously. AT&T collects and compiles the same information reflected in Duke Progress's permitting form, completes the same work that occurs at each step of Duke Progress's permitting process, and often must wait *longer* than its competitors to begin the required work, which delays AT&T's ability to deploy its facilities.⁵⁵

29. Mr. Freeburn also says that AT&T does not need to “pay[] the costs associated with such a[permit] application.”⁵⁶ This is wrong. AT&T incurs the costs, but does so by performing the work itself. As Mr. Freeburn explains, AT&T's competitors pay “costs ... *incurred by DEP*” during the permitting process.⁵⁷ DEP does not incur these costs *for* AT&T because AT&T performs the work itself instead.⁵⁸ It appears from Mr. Freeburn's declaration that Duke Progress may double-check AT&T's inspection work—he says that “DEP performs

⁵⁴ Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

⁵⁵ See Compl. Ex. C at ATT00043-44 (Peters Aff. ¶¶ 16-17).

⁵⁶ Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

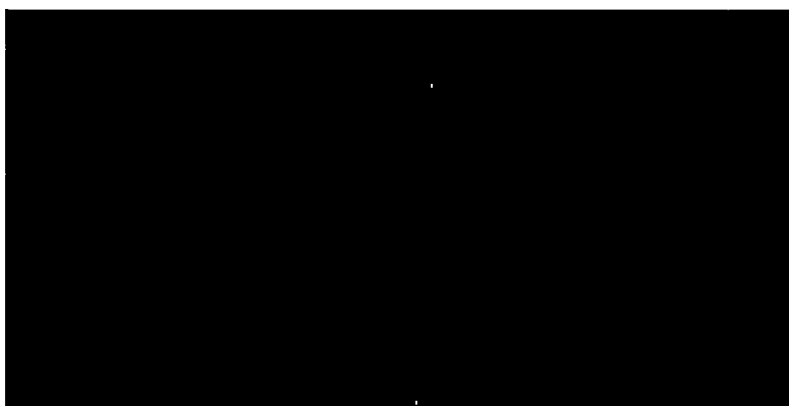
⁵⁷ *Id.* (emphasis added).

⁵⁸ Compl. Ex. C at ATT00041, ATT00043-44 (Peters Aff. ¶¶ 13, 17). Even if Duke Progress chooses to duplicate the work performed by AT&T, AT&T does not benefit from it. AT&T was unaware of Duke Progress's belief that it duplicates this work until it reviewed Mr. Freeburn's declaration.

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the same post-construction inspections with respect to AT&T's attachments as it performs for CATV and CLEC permit applications."⁵⁹ Double-checking inspection work is Duke Progress's prerogative as a pole owner, but it certainly is not work required by the JUA.⁶⁰ It is also not work that AT&T asked Duke Progress to perform or from which AT&T derives a benefit. And it cannot justify charging AT&T for *permitting* and *engineering* work Duke Progress does not perform for AT&T.

30. Mr. Freeburn's list of allegedly avoided fees is particularly suspect.⁶¹ He does not substantiate any of the fees with invoices or payment records. He does not explain what work is covered by what fees. He does not identify language in Duke Progress's license agreements that allow it to charge all the various fees. He admits some fees do not apply to every pole.⁶² And he did not ask Mr. Metcalfe to include all the fees in his analysis, which confirms that the list is significantly inflated. Mr. Metcalfe purports to value *all* fees that may be charged AT&T's competitors but then uses just █ from Mr. Freeburn's list of █.⁶³



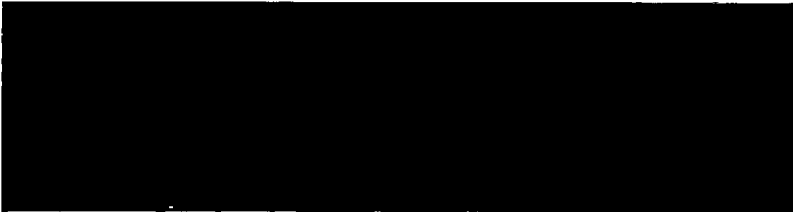
⁵⁹ Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 21).

⁶⁰ Compl. Ex. 1 at ATT00096-100 (JUA, Arts. VI & VII).

⁶¹ See Answer Ex. A at DEP000267 (Freeburn Decl., Ex. A-2).

⁶² See, e.g., Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 21).

⁶³ Answer Ex. E at DEP000335-337 (Metcalfe Decl. ¶¶ 25-27); see also Answer Ex. A at DEP000267 (Freeburn Decl., Ex. A-2); Answer Ex. E at DEP000377 (Metcalfe Decl., Ex. E-4.2).



Judging from the descriptions, Mr. Metcalfe should not have included any of the alleged fees in his analysis. AT&T completes its own engineering for new attachments, which includes collecting and compiling the same information that appears on Duke Progress's permit form; identifying make-ready required of other attachers on the pole; performing its own pre- and post-construction inspections; and conducting its own structural, loading, and field analyses of poles to determine the capacity for a new AT&T attachment. AT&T pays for its own NJUNS membership and does not require Duke Progress's contractor to manage data or generate any pole reports. The JUA does not require Duke Progress to perform any of this work for AT&T.

31. Moreover, the fees Mr. Freeburn lists would have been incurred, if ever, when an attacher first placed its facilities on Duke Progress's poles. But Duke Progress does not attempt to value these fees for AT&T's future deployment. Instead, it tries only to value what AT&T would have paid if it had paid all the fees (at current-day values) when it deployed facilities on 148,000+ poles years or decades ago.⁶⁴ But AT&T has already more than covered those fees, which Duke Progress claims amount to about [REDACTED] per pole,⁶⁵ with JUA rates that have been [REDACTED] higher per pole than new telecom rates.⁶⁶

32. Mr. Freeburn also ignores costs that AT&T incurs to accommodate Duke Progress's facilities on AT&T's poles. For example, AT&T's construction managers are trained

⁶⁴ See Answer Ex. E at DEP000377 (Metcalfe Decl., Ex. E-4.2).

⁶⁵ Answer Ex. E at DEP000377 (Metcalfe Decl., Ex. E-4.2).

⁶⁶ Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12).

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to complete safety inspections of AT&T's facilities and poles while in the field, as well as the facilities attached to AT&T's poles. Thus, to the extent Duke Progress performs post-construction inspections of AT&T's attachments on the parties' joint use poles, AT&T also performs post-construction inspections of Duke Progress's attachments on those same poles. Similarly, Mr. Freeburn says that Duke Progress completes work to "transfer[] or rearrange[] its electric supply facilities to accommodate AT&T"⁶⁷ because the JUA states that "[e]xcept as otherwise expressly provided herein, each party shall place, maintain, rearrange, transfer, and remove its own Attachments at its own expense..."⁶⁸ But the opposite is also true—AT&T completes the work to accommodate Duke Progress's attachments on AT&T's poles without reimbursement from Duke Progress. Mr. Freeburn does not account for this work AT&T completes for Duke Progress, let alone prove that AT&T completes less rearrangement and transfer work for Duke Progress each year than vice versa. There is a good reason for this—according to Mr. Burlison, Duke Progress has been installing 45-foot poles to accommodate communications attachers.⁶⁹ There should be no need to rearrange power facilities on these poles as the existing communications space can already accommodate several attaching entities. And Duke Progress's parent company informed the Commission that "the vast majority of make-ready involves only the rearrangement of communications attachments."⁷⁰

⁶⁷ Answer Ex. A at DEP000259 (Freeburn Decl. ¶ 32).

⁶⁸ Compl. Ex. 1 at ATT00096 (JUA, Art. VI).

⁶⁹ Answer Ex. C at DEP000299 (Burlison Decl. ¶ 15).

⁷⁰ Reply Comments of Duke Energy Corp., et al. at 13, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (July 17, 2017).

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33. *Fifth*, Duke Progress claims AT&T is advantaged because the parties pay for make-ready “based on scheduled (a/k/a ‘tabulated’) costs as opposed to work order costs.”⁷¹ This cannot be an advantage if the scheduled costs are the same or greater than the actual cost for the same work. Mr. Freeburn does not make this showing. Instead, he compares apples to oranges, pairing the lowest value in the JUA’s pole replacement cost schedule to an unsourced and uncorroborated allegation about Duke Progress’s average cost to replace poles of all heights and sizes and to transfer its facilities to the replacement pole.⁷² This significantly inflates Mr. Freeburn’s [REDACTED] cost estimate and renders it utterly inappropriate for use as a comparison to the pole replacement costs in the JUA schedule. As Mr. Metcalfe explains, he learned from Mr. Freeburn that Duke Progress’s “equipment transfer costs” are “a significant component” of the [REDACTED] estimate.⁷³

34. In reality, the JUA cost schedule is designed to reflect actual costs. It is referred to throughout Article VII as reflecting “the cost” for the work; it provides a mechanism for updating the costs each year based on the Handy Whitman Index, which, as Mr. Metcalfe explains, “calculates the cost trends for different types of utility construction;” and the JUA states that if the parties cannot agree on the annual cost updates, “the amount to be billed thereafter ... shall be the actual cost of the work.”⁷⁴ AT&T is not advantaged.

⁷¹ Answer Ex. A at DEP000255 (Freeburn Decl. ¶ 23); *see also* Answer ¶ 8.

⁷² *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35).

⁷³ Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48).

⁷⁴ Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Answer Ex. E at DEP000347 (Metcalfe Decl. ¶ 51).

C. Duke Progress's Remaining Allegations Are Equally Meritless.

35. I disagree with several other operational claims in Duke Progress's Answer and declarations. For example, Duke Progress says AT&T is competitively advantaged because of its typical location as the lowest attacher on a pole, but then admits that there are "certain costs and risks attendant to the lowest position on the pole."⁷⁵ It also acknowledges that AT&T does not *always* have that lowest spot.⁷⁶ That should be the situation more and more going forward, as AT&T continues to encourage other communications attachers to use pole space below AT&T's facilities.⁷⁷ So, contrary to Duke Progress's allegation,⁷⁸ AT&T *does* work "through" other company's facilities and *does* ensure that its cable is taut so that it will not interfere with communications facilities below.

36. Mr. Freeburn is wrong that AT&T's location on a pole allows it to "transfer its facilities to new poles for maintenance projects and operational upgrades faster and more easily than higher mounted communications attachments."⁷⁹ The opposite is true. When a pole is replaced, each company attached to the pole must successively transfer its facilities to the replacement pole, with the companies completing the transfers sequentially from the pole top down to the lowest attacher. Because AT&T is typically the lowest attacher on the pole, it typically is the last party able to transfer its facilities to the replacement pole because it has to wait for the other attachers to complete their transfers first. And it is not uncommon for AT&T

⁷⁵ Answer ¶ 19.

⁷⁶ Answer Ex. C at DEP000300 (Burlison Decl. ¶ 17) (stating AT&T is "almost always the lowermost wireline attaching entity").

⁷⁷ See, e.g., Compl. Ex. C at ATT00045 (Peters Aff. ¶ 21).

⁷⁸ See Answer ¶ 19.

⁷⁹ Answer Ex. A at DEP000253 (Freeburn Decl. ¶ 19).

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to travel to a pole to transfer its facilities only to find that the company above it had not in fact transferred its facilities as reported, further delaying AT&T's ability to transfer its facilities and increasing its costs by requiring repeat trips.

37. Duke Progress also says AT&T is advantaged when Duke Progress replaces an AT&T pole following an emergency,⁸⁰ but this is a competitive disadvantage. Duke Progress admits that AT&T pays for these pole replacements.⁸¹ AT&T's competitors do not pay for similar pole replacements because, as Mr. Freeburn explains, "CATVs, CLECs and other third parties..., unlike AT&T, do not own poles."⁸² And, although Mr. Freeburn claims it is a "benefit" to AT&T (albeit not a *competitive* benefit) that AT&T can rely on Duke Progress's "crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night on a moment's notice," he does not identify a single cost that AT&T does not cover.⁸³ And, in any event, AT&T has its own "crews, equipment, inventory, dispatchers, engineers" and can and does replace its "poles in the middle of the night on a moment's notice."⁸⁴

38. Throughout its Answer, Duke Progress criticizes AT&T for not owning more poles, even though that would only increase AT&T's costs as compared to its competitors. Duke Progress also fails to acknowledge its own role in the parties' increasing pole ownership disparity. Under the JUA, Duke Progress is required to "take into consideration the desirability

⁸⁰ Answer ¶ 20.

⁸¹ Answer Ex. A at DEP000259-260 (Freeburn Decl. ¶ 33).

⁸² *Id.* at DEP000249 (Freeburn Decl. ¶ 10).

⁸³ *Id.* at DEP000259 (Freeburn Decl. ¶ 33).

⁸⁴ *See* Reply Ex. D at ATT00416-417 (Dalton Reply Aff. ¶¶ 11-12); Reply Ex. E at ATT00428 (Oakley Reply Aff. ¶ 10).

of having the new pole facilities owned by the party owning the lesser number of poles” each time it decides to install any new poles.⁸⁵ I am not aware of Duke Progress ever providing AT&T an opportunity to install and own new poles. Instead, Duke Progress has simply installed the poles itself and increased its pole ownership advantage.

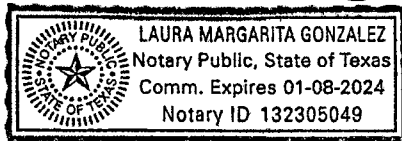
39. For all of these reasons and those expressed in my prior Affidavit, it remains my opinion that Duke Progress has not identified any net benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T’s payment of a higher rental rate for use of Duke Progress’s poles.



Mark Peters

Sworn to before me on
this 18th day of December, 2020

Notary Public

⁸⁵ Compl. Ex. 1 at ATT00096 (JUA, Art. VII.C).